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No. 97-____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

VERN T. JORDAHL, MARY-BETH LAROCK, and VIRGINIA LEADERSHIP COUNCIL,

Petitioners,

v.

DEMOCRATIC PARTY OF VIRGINIA, RICHMOND CITY DEMOCRATIC COMMITTEE, and COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners' First Amendment challenge to Virginia Code §§ 24.2-908, 24.2-910, 24.2-1014, and 8.01-620 as an unconstitutional system of prior restraint is ripe, when certain Respondents repeatedly enforced substantively identical predecessor versions of the challenged statutes to enjoin Petitioners' distribution of voter guides in recent Virginia elections, when Respondents expressly reserve their right to do so again, and when the Petitioners allege that the prior injunctions against them chill and deter their core political speech about candidates, issues, and elections.

2. Whether Virginia Code §§ 24.2-908, 24.2-910, 24.2-1014, and 8.01-620, which in combination authorize Virginia state courts to enjoin the distribution of written materials concerning candidates, issues, and elections for alleged election law violations, constitute a system of prior restraints of core political speech that is *per se* unconstitutional under the First Amendment.

3. Whether the *Rooker-Feldman* doctrine divests a federal district court of jurisdiction over damages claims arising out of state court injunctions that were overturned prior to the initiation of the federal action.

4. Whether state court injunctions are legislative rather than judicial acts for purposes of the *Rooker-Feldman* doctrine.

5. Whether the *Rooker-Feldman* doctrine divests a federal district court of jurisdiction over damages claims arising out of *ex parte* state court temporary injunctions.

6. Whether, if the District Court erred in dismissing Petitioners' federal law claims for lack of subject-matter jurisdiction, the District Court abused its discretion under 28 U.S.C. § 1367(c)(3) by dismissing Petitioners' supplemental state law claims.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE ... 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 13

I. The Court of Appeals' Holding That Petitioners' Prior Restraint Challenge Is Not Ripe Conflicts with Previous Decisions of this Court and Creates a Conflict in the Circuits. 15

II. This Court Should Decide the Important Question of Whether Prior Restraints of Core Political Speech Are *Per Se* Unconstitutional, Rather Than Merely Presumptively Unconstitutional. 19

III. This Court Should Decide the Important Question of Whether the *Rooker-Feldman* Doctrine Bars Federal Jurisdiction over

Damages Claims Arising out of State Court Injunctions That Were Overturned in the State Court System. 24

IV. This Court Should Resolve the Conflict in the Circuits over Whether a State Court Injunction is a Legislative or Judicial Act for Purposes of the *Rooker-Feldman* Doctrine. . . 28

V. This Court Should Resolve the Conflict in the Circuits Whether the *Rooker-Feldman* Doctrine Bars Federal Jurisdiction over § 1983 Damages Claims Arising out of *Ex Parte* Temporary Injunctions. 30

VI. If This Court Should Otherwise Review the Court of Appeals' Decision, This Court Should Also Review the Court of Appeals' Affirmance of the District Court's Dismissal of Petitioners' State Law Claims. 32

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

American Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992) 17

ASARCo Inc. v. Kadish, 490 U.S. 605, 109 S. Ct. 2037 (1989) 24

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 99 S. Ct. 2301 (1979) 16, 18

Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612 (1976) 6

Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 89 S. Ct. 347 (1968) 18-20, 31

Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993), *vacated on other grounds*, 41 F.3d 1421 (11th Cir. 1994) 29

City of Houston v. Hill, 482 U.S. 451, 107 S. Ct. 2502 (1987) 16

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303 (1983) 24, 25, 28, 29

Family Found., Inc. v. Brown, 9 F.3d 1075 (4th Cir. 1993) 6

Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209 (1964) 20

Gordon v. Marrone, 590 N.Y.S.2d 649 (N.Y. Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (N.Y. App. Div. 1994) 7

Guste v. Connick, 515 So. 2d 436 (La. 1987) 23

Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 55 S. Ct. 197 (1934) 29

Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994) 25-28

Henson v. East Lincoln Twp. 814 F.2d 410 (7th Cir. 1987), *cert. dismissed*, 506 U.S. 1042, 113 S. Ct. 1035 (1993) 29

Homola v. McNamara, 59 F.3d 647 (7th Cir. 1995) 26, 28, 31

Hoover v. Wagner, 47 F.3d 845 (7th Cir. 1995) 29

John P. King Mfg. Co. v. City Council of Augusta, 277 U.S. 100, 48 S. Ct. 489 (1928) 29

Johnson v. DeGrandy, 512 U.S. 997, 114 S. Ct. 2647 (1994) 24

Jordahl v. Democratic Party of Virginia, 122 F.3d 192 (4th Cir. 1997) ..... *passim*

Jordahl v. Democratic Party of Virginia, 947 F. Supp. 236 (W.D. Va. 1996) 1, 11, 12

Lathrop v. Donohue, 367 U.S. 820, 81 S. Ct. 1826 (1961) 29

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 115 S. Ct. 1511 (1995) 9, 20

Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S. Ct. 621 (1971) 20

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791 (1976) 19, 21

Neiderhiser v. Borough of Berwick, 840 F.2d 213 (3d Cir. 1988), *cert. denied*, 488 U.S. 822, 109 S. Ct. 67 (1988) 17

Nixon v. Fitzgerald, 457 U.S. 731, 102 S. Ct. 2690 (1982) 22

Northeastern Florida Chapter of Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 113 S. Ct. 2297 (1993) 15

Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 106 S. Ct. 2718 (1986) 16

Powell v. Powell, 80 F.3d 464 (11th Cir. 1996) 31

Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S. Ct. 67 (1908) 29

Rembert v. Sheahan, 62 F.3d 937 (7th Cir. 1995) 15

Renne v. Geary, 501 U.S. 312, 111 S. Ct. 2331 (1991) 17

Republican Party of Florida v. Florida Elections Comm'n, 658 So. 2d 653 (Fla. Dist. Ct. App. 1995) 23

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814 (1980) 20

Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902, 106 S. Ct. 3269 (1986) 31

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct 149 (1923) 24, 26

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239 (1975) 19, 23

State of Wisconsin ex rel. WMC Issues Mobilization Council, Inc. v. Circuit Court for Dane County, No. 96-3133-W (Wis. App. 1st & 4th Dist. November 8, 1996) 23

Steffel v. Thompson, 415 U.S. 452, 94 S. Ct. 1209 (1974) 16

Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S. Ct. 391 (1961) 19

United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc., 857 F.2d 422 (8th Cir. 1988) 17

United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) 17

Valley Broad. Co. v. United States, 107 F.3d 1328 (9th Cir. 1997) 16

Vance v. Universal Amusement Co., 445 U.S. 308, 100 S. Ct. 1156 (1980) 19

Virginia Soc'y for Human Life, Inc. v. Caldwell, 906 F. Supp. 1071 (W.D. Va. 1995) 9, 11, 12

Walker v. City of Birmingham, 388 U.S. 307, 87 S. Ct. 1824 (1967) 22

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971) 6

U.S. CONSTITUTION & FEDERAL STATUTES

U.S. CONST. art. III, § 2 1

U.S. CONST. amend. I 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1257 ..... 2, 24, 25

28 U.S.C. § 1331 ..... 3, 8, 24, 25

28 U.S.C. § 1367(c)(3) 11, 13, 32

VIRGINIA STATUTES

1995 Va. Op. Att'y Gen. 170 (1995) 9

VA. CODE § 8.01-620 ..... 3, 5, 8, 10, 12

VA. CODE § 24.2-908 ..... 8-10, 12

VA. CODE § 24.2-910 ..... 7-10, 12

VA. CODE § 24.2-1014 ..... 8, 9, 12

Virginia Campaign Finance Disclosure Act VA. CODE § 24.2-900 *et seq.* 7-12, 15

Virginia Fair Elections Practices Act, VA. CODE § 24.1-251, *et seq.* (repealed December 1, 1993) 5, 9, 11, 12, 15

MISCELLANEOUS AUTHORITIES

John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 433 (1983) 21

2 MOORE'S FEDERAL PRACTICE, § 12.30[4] (3d ed. 1997) 30

G. PRING & P. CANAN, SLAPPs: GETTING SUED FOR SPEAKING OUT (1996) 7

R. SMOLLA, SMOLLA AND NIMMER ON FREEDOM ON SPEECH: A TREATISE ON THE FIRST AMENDMENT § 8.02[2] (1994) 22

Vern T. Jordahl, Mary-Beth LaRock, and the Virginia Leadership Council respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported as *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192 (4th Cir. 1997), and reprinted in the Appendix ("App.") at App. 31-55. The decision of the Court of Appeals affirmed the District Court's decision, which is reported as *Jordahl v. Democratic Party of Virginia*, 947 F. Supp. 236 (W.D. Va. 1996), and reprinted at App. 17-29.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourth Circuit entered its judgment and opinion on July 28, 1997. On August 11, 1997, Petitioners timely filed a petition for rehearing and suggestion for rehearing in banc, which the Court of Appeals denied on August 22, 1997. App. 56-57.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Article III, § 2

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States,

and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. § 1257

§ 1257. State courts, certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State

is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367 (reprinted at App. 65-67)

Virginia Code § 8.01-620

§ 8.01-620. General jurisdiction of Circuit Court to award injunctions.

Every circuit court shall have jurisdiction to award injunctions, including cases involving violations of the Uniform Statewide Building Code, whether the judgment or proceeding enjoined be in or out of the circuit, or the

party against whose proceedings the injunction be asked resides in or out of the circuit.

Virginia Code § 24.2-901 (enacted December 1, 1993, and as amended effective July 1, 1996) (reprinted at App. 67-70)

Virginia Code § 24.2-908 (enacted December 1, 1993, and as amended effective July 1, 1996) (reprinted at App. 70-72)

Virginia Code § 24.2-910 (enacted December 1, 1993, and as amended effective July 1, 1996) (reprinted at App. 72-73)

Virginia Code § 24.2-1014 (enacted December 1, 1993, and as amended effective July 1, 1996) (reprinted at App. 73-75)

Virginia Code § 24.1-254.1 (repealed December 1, 1993) (reprinted at App. 75-78)

Virginia Code § 24.1-255(C) (repealed December 1, 1993) (reprinted at App. 78)

Virginia Code § 24.1-277 (repealed December 1, 1993) (reprinted at App. 79-81)

STATEMENT OF THE CASE

In the closing days of Virginia's 1989 and 1993 general elections for Governor, Lieutenant Governor, and Attorney General, as public interest in and attention to those elections peaked, Respondents Democratic Party of

Virginia and Richmond City Democratic Committee (collectively, "Democratic Party") and others, with the active assistance of officials of the Virginia State Board of Elections and pursuant to VA. CODE § 8.01-620, instituted *ex parte* state court temporary injunctions against Petitioners. These injunctions barred Petitioners and others from peacefully distributing their voter guides and other leaflets concerning candidates and issues in the then-imminent elections.[1]

The Democratic Party alleged that Petitioners and others violated §§ 24.1-254.1 and 24.1-255(C) of the Virginia Fair Elections Practices Act (VFEPA), VA. CODE § 24.1-251, *et seq.* (repealed December 1, 1993), by engaging in pamphleteering activities with the purpose of influencing the elections without registering as "political committees" and filing contribution and expenditure reports with the State Board of Elections. The Democratic Party also alleged that Petitioners violated VA. CODE § 24.1-277(B) for failing (in 1989) to include on the voter guides and other leaflets the identity and residence address of the person responsible for the voter guide, and for failing (in 1993) to include a political committee registration number assigned by the State Board of Elections.

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[1] The *ex parte* temporary injunctions were strategically timed to thwart the state-wide distribution of more than a million voter guides in both the 1989 and 1993 elections, even if the injunctions were ultimately overturned on appeal. For instance, in 1993, the Democratic Party obtained its *ex parte* temporary injunction late in the afternoon on Friday, October 22, 1993. Hundreds of thousands of voter guides were to have been distributed on Sunday, October 24, 1993, at churches throughout Virginia. The Democratic Party issued public statements threatening *non-parties* with prosecution for criminal contempt if they distributed the voter guides during the pendency of the state court's temporary injunction.

Petitioners' voter guides did not expressly advocate the defeat or election of any candidate, and merely explicated the policy positions taken by the major parties' candidates for state-wide and local office. Petitioners' position was that *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976), did not permit the Commonwealth to apply its campaign registration and reporting requirements to such "issue advocacy."

In the two underlying Fairfax County enforcement actions, the *ex parte* temporary injunctions were made permanent after hearings,[2] but thereafter were overturned.[3] In the 1989 City of Richmond enforcement

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[2] In 1989, the Fairfax Circuit Court issued its *ex parte* temporary injunction on Saturday, November 4, 1989, and held a hearing on Monday, November 6, 1989, at which Petitioners were not represented by counsel. At the November 6 hearing, the Circuit Court entered a permanent injunction that was not dissolved until 1994. In 1993, the Fairfax Circuit Court issued its *ex parte* temporary injunction late in the afternoon on Friday, October 22, 1993, and held a hearing on Wednesday, October 27, 1993, at which Petitioners were represented by counsel. At the October 27 hearing, the Circuit Court entered a permanent injunction that the Virginia Supreme Court dissolved on Monday, November 1, 1993, the day before the election.

[3] The Virginia Supreme Court did not include any reasons with its summary order dissolving the 1993 Fairfax Circuit Court injunction. Petitioners also sought federal relief against the state court judge's enforcement of his injunction, but the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit abstained on the basis of this Court's decision in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971), even though the Fourth Circuit acknowledged that the state court injunction inflicted "substantial irreparable injury" to Petitioners' First Amendment rights. *Family Found., Inc. v. Brown*, 9 F.3d 1075,

action, the Circuit Court's *ex parte* temporary injunction lapsed on its own terms after one week. The court ultimately dismissed that action in 1994 for failure to prosecute. Thus, although the injunctions against Petitioners either lapsed or were overturned in the state court system, the Democratic Party effectively silenced Petitioners' core political speech in the crucial closing days of Virginia's general election campaigns.[4]

Effective December 1, 1993, the Virginia General Assembly repealed the VFEPA and substantively recodified it as the Virginia Campaign Finance Disclosure Act ("VCFDA"), VA. CODE § 24.2-900 *et seq*. The relevant provisions previously applied against Petitioners were recodified with non-material changes.[5]

1076 (4th Cir. 1993) (Luttig, J., Single Circuit Judge).

[4] The Democratic Party's enforcement actions constituted "SLAPPs" (Strategic Lawsuits Against Public Participation). *See* G. Pring & P. Canan, SLAPPs: GETTING SUED FOR SPEAKING OUT 8-11 (1996). One court has described SLAPPS as "suits without substantial merit that are brought . . . to stop citizens from exercising their political rights or to punish them for having done so." *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (N.Y. App. Div. 1994) (internal quotation marks and citation omitted).

[5] *Compare, e.g,* former VA. CODE § 24.1-254.1 (defining "committees" and requiring such "committees" to register with Board of Elections) *with* VA. CODE §§ 24.2-901 (defining "political committees" as including "committees" under the former law) *and* 24.2-908 (requiring "political committees" and other persons to register with Board of Elections); former VA. CODE § 24.1-255(C) (requiring "committees" to file receipts and expenditure reports with Board of Elections) *with* VA. CODE § 24.2-910 (same); former VA. CODE § 24.1-277(B)(2)(b) (requiring written materials concerning candidates for elective office to identify the

In 1994, the Virginia General Assembly amended the newly-enacted VCFDA to exclude from VA. CODE § 24.2-901's definition of "political committee" organizations holding tax-exempt status under § 501(c)(3) of the Internal Revenue Code. The Petitioners do not fall within this exception.

On October 2, 1995, approximately one month before Virginia's mid-term state legislative elections, Petitioners brought this action against the Democratic Party. Petitioners' First Amended Complaint sought: (1) a declaratory judgment under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 that VA. CODE §§ 24.2-908, 24.2-910, and 24.2-1014, when coupled with the injunction enforcement mechanism of VA. CODE § 8.01-620, constitute an unconstitutional system of prior restraint; (2) injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2202 against the Democratic Party's enforcement of the challenged Virginia statutes; and (3) compensatory and punitive damages under 42 U.S.C. § 1983 and state law claims for malicious prosecution, abuse of process, and trespass to chattels. Petitioners invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4) for their § 1983 claims and under 28 U.S.C. § 1367 for their state law claims.

In a companion action brought on the same day and in the same court, the Virginia Society for Human Life sued various Virginia public officials seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 against VA. CODE §§ 24.2-908, 24.2-910, and 24.2-1014 on the grounds that these statutes are unconstitutionally overbroad, both facially and as applied.

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responsible individual(s) and the registration number assigned by the Board of Elections) *with* VA. CODE § 24.2-1014 (same).

See Virginia Soc'y for Human Life, Inc. v. Caldwell, 906 F. Supp. 1071 (W.D. Va. 1995) ("*VSHL*"), reprinted at App. 1-16. *VSHL* and this action were consolidated as related cases and assigned to the same district judge.

In *VSHL*, the District Court initially recognized that the recodification and amendment of the VCFDA did not materially alter the substantive law, *see* App. 4; 906 F. Supp. at 1073 (characterizing the challenged VCFDA provisions as "similarly worded" to the VFEPA provisions previously enforced by the Democratic Party), and on October 30, 1995, entered a preliminary injunction against Virginia's enforcement of VA. CODE §§ 24.2-908, 24.2-910, and 24.2-1014 based on the "chilling effect" caused by the Democratic Party's prior enforcement actions. App. 13; 906 F. Supp. at 1077.

In 1996, during the pendency of this action and *VSHL* in the District Court, the Virginia General Assembly further amended the VCFDA in response to this Court's decision in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S. Ct. 1511 (1995) (holding that state statute prohibiting anonymous leafletting was unconstitutional as applied in the context of election referendum). The Virginia General Assembly, apparently relying upon the advice of the Virginia Attorney General, *see* 1995 Va. Op. Att'y Gen. 170, construed *McIntyre* as only applying to political speech concerning *referenda* (as opposed to candidate elections). These amendments (reprinted at App. 58-65), which took effect on July 1, 1996, thus (1) repealed VA. CODE § 24.2-1014's requirement that written material concerning election *referenda* contain an authorization statement identifying the responsible individual; (2) repealed VA. CODE § 24.2-910's requirement that "political committees" and other persons file expenditure reports concerning election *referenda* with the Board of Elections; and (3) repealed the requirement that an individual who

expends more than $500 out of personal funds in statewide election register as a political committee under VA. CODE § 24.2-908. Such persons, however, must continue to file expenditure reports with the Board of Elections pursuant to VA. CODE § 24.2-910.

Like the 1993 recodification and the 1994 amendment, the 1996 amendments to the VCFDA do not prevent the Democratic Party from again enjoining Petitioners from distributing their voter guides in Virginia elections. The VCFDA *still* requires "political committees" engaged in pamphleteering with the purpose of influencing elections to register with the State Board of Elections, to file expenditure and receipt reports with the same state agency, and to identify on political pamphlets the name and residence address of the responsible person, along with the registration number assigned by the Board. These requirements may *still* be enforced by injunctions pursuant to VA. CODE § 8.01-620. Virginia election law, as it has been repeatedly applied against Petitioners, remains substantively *unchanged* since the previous state court enforcement actions undertaken by the Democratic Party, notwithstanding the 1996 amendments.

In the District Court, the Petitioners moved for partial summary judgment with respect to their request for declaratory and injunctive relief under § 1983, and the Democratic Party's liability for damages under § 1983 and certain state law claims. The Democratic Party moved to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. While these motions were pending, the District Court granted Virginia's motion to intervene to defend the challenged statutes' constitutionality.

On September 30, 1996, the District Court granted the Democratic Party's motion to dismiss for lack of

subject-matter jurisdiction. App. 30. In its opinion, the District Court ruled that Petitioners' "as applied" challenge to the VCFDA and its injunction enforcement mechanism was not ripe because the previous enforcement actions had been undertaken in the name of the now-repealed VFEPA, and because the recodified and amended VCFDA had yet to be enforced against Petitioners. App. 22; 947 F. Supp. at 239 ("A challenge based on the statutes in effect at the time of the plaintiffs' alleged injury would be moot because those statutes no longer exist in the same form, and a challenge based on the current statutes is premature because they have not yet been applied.").[6] The District Court further ruled that Petitioners' First Amended Complaint failed to assert a facial challenge to the challenged Virginia statutes. *Id.*

The District Court also concluded, after raising the issue *sua sponte* in the motions hearing and requesting additional briefing, that under the *Rooker-Feldman* doctrine it lacked jurisdiction over Petitioners' § 1983 damages claims, because any award of damages would necessarily imply that the state courts had erred in issuing the injunctions in question, even though the state courts themselves had dissolved two of the injunctions. App. 25-26; 947 F. Supp. at 240-41. The District Court also held that the state court injunctions were judicial rather than legislative acts for purposes of the *Rooker-Feldman* doctrine. App. 27-28; 947 F. Supp. at 241.

Finally, the District Court dismissed Petitioners' supplemental state law claims pursuant to 28 U.S.C.

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[6] The same District Judge had ruled in the companion *VSHL* case that notwithstanding the recodification and amendment of the VCFDA, the challenged provisions were "similarly worded" to the VFEPA provisions previously enforced against Petitioners. *See* App. 4; 906 F. Supp. at 1073.

§ 1367(c)(3). App. 28; 947 F. Supp. at 241-42. In granting the Democratic Party's motion to dismiss, the District Court did not act upon the Petitioners' fully briefed motion for partial summary judgment.[7]

On July 28, 1997, the Court of Appeals affirmed the District Court's judgment. App. 31-55; *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192 (4th Cir. 1997). The Court of Appeals held that Petitioners' prior restraint challenge to VA. CODE §§ 24.2-908, 24.2-910, 24.2-1014, and § 8.01-620 was exclusively an "as applied" challenge rather than, as Petitioners contend, an "as applied" *and* facial challenge. App. 42-43; 122 F.3d at 198-99. The court also held that the Petitioners' "as applied" challenge was not ripe, because the challenged VCFDA provisions had never been enforced against them, and because the VFEPA provisions that had been enforced against them had been repealed. App. 40-42; 122 F.3d at 198. In so ruling, however, the Court of Appeals simply ignored Petitioners' contention that the recodification and amendment of the VCFDA did not materially change the substantive law that previously had been enforced against Petitioners.

With respect to the District Court's dismissal of Petitioners' § 1983 damages claims on *Rooker-Feldman* grounds, the Court of Appeals ruled that (1) contrary to Petitioners' argument, the underlying injunctions were judicial, rather than legislative, acts for purposes of the *Rooker-Feldman* doctrine, App. 47-49; 122 F.3d at 200-01; (2) contrary to Petitioners' argument, the *Rooker-Feldman*

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[7] After its dismissal of this case, the same District Court granted Virginia's motion to dismiss the plaintiffs' complaint in *VSHL*, on the grounds that the *VSHL* plaintiffs lacked standing to challenge the statutes in question if the statutes were given a narrow, saving construction. The *VSHL* plaintiffs' appeal is currently pending in the Court of Appeals.

doctrine barred federal jurisdiction over Petitioners' § 1983 damages claims even though the underlying injunctions had been overturned prior to the commencement of the federal court action, App. 49-53; 122 F.3d at 201-03; and (3) because the state courts (eventually) held hearings, and because state law provided for a right of appeal of the *ex parte* temporary injunctions, the *Rooker-Feldman* doctrine barred Petitioners' § 1983 damages claims based on the entry of the initial, *ex parte* restraining orders. App. 53; 122 F.3d at 203 n.11.

Finally, the Court of Appeals held that the District Court's dismissal of Petitioners' state-law claims pursuant to 28 U.S.C. § 1367(c)(3) was not an abuse of discretion. App. 54-55; 122 F.3d at 203.

On August 22, 1997, the Court of Appeals denied Petitioners' timely-filed petition for rehearing and suggestion for rehearing in banc.

REASONS FOR GRANTING THE WRIT

Introduction

The Court of Appeals' decision conflicts with decisions of this Court and other circuits, and involves important questions of federal jurisdiction and First Amendment law that this Court should resolve. In the closing days of Virginia's two most recent gubernatorial elections preceding the commencement of this action, the Democratic Party employed legally indistinguishable predecessor versions of the challenged Virginia statutes to silence Petitioners' core political speech for alleged election law violations. Notwithstanding this pattern of enforcement, the Court of Appeals held, in conflict with decisions of this Court and other courts of appeals, that

Petitioners' prior restraint challenge is not ripe because the enforcement actions were undertaken under a statutory regime that has been recodified and amended, even though the recodification and amendments did not remove or correct the constitutional deficiencies alleged by Petitioners.

On the merits of Petitioners' prior restraint challenge, this case affords this Court the opportunity to declare what its earlier cases implicitly teach, namely, that prior restraints of core political speech are *per se* unconstitutional, rather than merely presumptively unconstitutional. The record demonstrates why it is imperative for this Court to announce such a bright-line rule protecting core political speech. Although injunctions of core political speech may ultimately be overturned on appeal, opportunities for *timely* speech on issues, candidates and elections are irretrievably lost while such appellate remedies are pursued.

This case also presents the Court with the opportunity to decide the important questions of whether the *Rooker-Feldman* doctrine is an absolute bar to federal jurisdiction over damages claims (whether grounded in § 1983, state law, or both) arising out of state court injunctions, even when the underlying injunctions were overturned in the state court system; whether state court injunctions are legislative or judicial acts for purposes of the doctrine; and whether the doctrine bars federal jurisdiction over § 1983 damages claims that arise from *ex parte* temporary injunctions.

I. The Court of Appeals' Holding That Petitioners' Prior Restraint Challenge Is Not Ripe Conflicts with Previous Decisions of this Court and Creates a Conflict in the Circuits.

The Court of Appeals held that Petitioners' First Amendment challenge is not ripe because the prior injunctions were issued to enforce the VCFDA's predecessor statute, the VFEPA, and because the VCFDA itself has been twice amended since it took effect. App. 40-42; 122 F.3d at 198. The Court of Appeals did not dispute Petitioners' contention, however, that the recodification and amendments of the VCFDA did not materially alter the law.

The Court of Appeals' decision squarely conflicts with this Court's decision in *Northeastern Florida Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662, 113 S. Ct. 2297, 2301 (1993). "[R]epealing [a] challenged statute and replacing it with one that differs only in some insignificant respect" does not moot a controversy concerning the statute, because the reenacted statute "disadvantages [the challengers] in the same fundamental way." *Id.* (footnote omitted). Thus, where a challenged statute has been repealed and recodified, for mootness purposes the question is "whether the new [statute] is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues. . . ." *Id.* at n.3. The Court of Appeals' holding also squarely conflicts with the decision of another federal appeals court. *See Rembert v. Sheahan*, 62 F.3d 937, 941 (7th Cir. 1995) ("if the injury of which a plaintiff complains continues even under the amended statute, then the possible issuance of an injunction promises a measure of relief, and a court may act"). The Court of Appeals' opinion ignored its conflicts with these decisions.

A claim for prospective declaratory and injunctive relief against a statute is ripe when there is a "reasonable threat of prosecution for conduct allegedly protected by the Constitution." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 625 n.1, 106 S. Ct. 2718, 2722 n.1 (1986) (citing *Steffel v. Thompson*, 415 U.S. 452, 458-60, 94 S. Ct. 1209, 1215-16 (1974)). *See also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2309 (1979) (challenge to statute is ripe where "there exists a credible threat of prosecution thereunder"). Put another way, when fear of enforcement of "an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'" *Id.* at 302, 99 S. Ct. at 2310-11 (citing *Steffel*, 415 U.S. at 459, 94 S. Ct. at 1216). When such a credible threat of prosecution exists, the statute may be challenged *prospectively* "on its face or as applied." *Steffel*, 415 U.S. at 475, 94 S. Ct. at 1224. Thus, whether Petitioners' challenge is deemed "facial" or "as applied," the ripeness inquiry is the same: is there a *"credible threat"* of future prosecution?

The Court of Appeals' decision conflicts with well-settled doctrine, reflected in decisions of this Court and several other circuits, that the *previous* enforcement of a statute establishes a "credible threat" of future prosecution under the statute and, thus, a ripe controversy for prospective declaratory and injunctive relief. *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 459 n.7, 107 S. Ct. 2502, 2508 n.7 (1987) (four previous arrests of political activist under statute "lends compelling support to the threat of future enforcement"); *Steffel*, 415 U.S. at 459, 94 S. Ct. at 1215-16 ("The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been 'chimerical.'") (citation omitted); *Valley Broad. Co. v. United States*, 107 F.3d 1328,

1330 n.2 (9th Cir. 1997) (previous enforcement of regulation demonstrated a "reasonable threat of prosecution"); *American Library Ass'n v. Barr*, 956 F.2d 1178, 1196 (D.C. Cir. 1992) ("It is the enforcement of an allegedly unconstitutional statute, '*past* or immediately threatened,' that causes the injury entitling those in the line of fire to seek judicial relief.") (emphasis added and quoting *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.)); *United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 427 (8th Cir. 1988) (plaintiffs had reason to fear enforcement of statute "based upon past experience: members had been arrested and prosecuted" for previous violations); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 217 (3d Cir. 1988), *cert. denied*, 488 U.S. 822, 109 S. Ct. 67 (1988) (previous application of ordinance "in a coercive manner" provided "sufficient justification for [plaintiff] to have a reasonable expectation of enforcement of the ordinance against it prospectively").

The Court of Appeals ignored this authority and instead relied upon *Renne v. Geary*, 501 U.S. 312, 111 S. Ct. 2331 (1991), for its conclusion that Petitioners' prospective claims for declaratory and injunctive relief are not ripe. In *Renne*, members of local committees of the state Democratic and Republican parties challenged a California constitutional provision that prohibited political party committees from endorsing candidates for certain offices. This Court held that the committee members' challenge was not yet ripe *because the absence of any prior enforcement attempts against the plaintiffs* showed that there was no "credible threat" of future enforcement of the challenged provision against the plaintiffs. *Renne*, 501 U.S. at 322, 111 S. Ct. at 2339.

Here, unlike in *Renne*, there is an established factual record of construction and enforcement of legally

indistinguishable statutory provisions, and it reveals that not only will Virginia circuit courts issue prior restraints under these provisions, they will do so upon *ex parte* application, notwithstanding well-established doctrine barring *ex parte* restraints of speech. *See Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180, 89 S. Ct. 347, 351 (1968). It is precisely this record of enforcement of the challenged statutes that establishes a "credible threat" of future enforcement, and thus a ripe controversy, for Petitioners' prospective claims for declaratory and injunctive relief.

Moreover, the Democratic Party itself confirmed in the District Court and the Court of Appeals that there is a "credible threat" of future enforcement. Rather than permanently disclaim any future enforcement intentions, the Democratic Party declared "that the Democratic Party will not seek to enforce these laws *without advance notice to the court*." Democratic Party Court of Appeals Brief at 18 (emphasis added). Thus, even today the Democratic Party reserves its asserted right to silence Petitioners' core political speech, so long as it gives "advance notice to the court." *See Babbitt*, 442 U.S. at 302, 99 S. Ct. at 2311 (since "the State has not disavowed any intention of invoking the criminal penalty provision against [violators]," the plaintiffs were "not without some reason in fearing prosecution for violation of the [statute]").

In direct conflict with this Court's decisions, the Court of Appeals' decision requires Petitioners to take their chances and distribute voter guides in Virginia state elections at their peril. Understandably, the Democratic Party's repeated enforcement actions have "chilled and deterred" Petitioners from doing so. First Amended Complaint, ¶ 39. In sum, because the Democratic Party's previous enforcement actions demonstrate a credible threat of enforcement of the challenged statutes, Petitioners'

prospective claim for declaratory and injunctive relief is ripe.

II. This Court Should Decide the Important Question of Whether Prior Restraints of Core Political Speech Are *Per Se* Unconstitutional, Rather Than Merely Presumptively Unconstitutional.

Prior restraint of speech, which is among "the most serious and the least tolerable infringements on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S. Ct. 2791, 2803 (1976), "suppresses the precise freedom which the First Amendment sought to protect against abridgment." *Carroll*, 393 U.S. at 181, 89 S. Ct. at 351. Accordingly, "*any* system of prior restraints of expression comes to this Court bearing a heavy presumption against its validity." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317, 100 S. Ct. 1156, 1162 (1980) (emphasis by the Court).

A presumptively unconstitutional system of prior restraint might be sustained only if the challenged system fits "within one of the narrowly defined exceptions to the prohibition against prior restraints." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S. Ct. 1239, 1247 (1975). While national security interests or incitements to violence in extreme cases might theoretically permit prior restraints, *see Times Film Corp. v. City of Chicago*, 365 U.S. 43, 47-48, 81 S. Ct. 391, 394 (1961) (cataloging possible "exceptional cases" where prior restraints might be permitted), it is incontrovertible that core political speech about candidates, issues, and elections — the target of the system of prior restraints challenged in *this* case — is entitled to the strongest possible First Amendment protection.

Political speech about candidates, issues, and elections "occupies the core of the protection afforded by the First Amendment," *McIntyre*, 514 U.S. at 346, 115 S. Ct. at 1518, and *"[n]o form of speech is entitled to greater constitutional protection. . . ." Id.* at 347, 115 S. Ct. at 1519 (emphasis added). *See also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72, 91 S. Ct. 621, 625 (1971) (the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office"). Because speech on these subjects "is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209, 216 (1964), the First Amendment here "has a *structural* role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587, 100 S. Ct. 2814, 2833 (1980) (Brennan, J., concurring) (emphasis in original).

As this Court has recognized, timeliness of core political speech is often critical if the speech is to have any value. *See Carroll*, 393 U.S. at 182, 89 S. Ct. at 352 ("It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. *A delay of even a day or two may be of crucial importance in some instances.*") (internal citations omitted and emphasis added). The singular danger of an injunction against core political speech is that even though the injunction might ultimately be invalidated on appeal, it

> will so delay publication as to make the speech untimely and hence valueless for its purpose. *The worst case would be an election-eve attempt by the party in power to enjoin publication of politically damaging information. In such circumstances, even the few days necessary to obtain expedited*

> *appellate review might prove seriously prejudicial to that system of representative government which the First Amendment, above all else, should be thought to undergird.*

John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 433 (1983) (emphasis added).

The record in this case vividly illustrates Professor Jeffries' then-hypothetical. On Saturday, November 4, only three days before the November 7, 1989 general election, the Democratic Party obtained *ex parte* temporary injunctions in Circuit Courts in the City of Richmond and Fairfax County barring Petitioners' distribution of voter guides. As a practical matter, it was impossible to retain counsel and obtain expedited appellate review prior to the November 7 election.

In 1993, the Fairfax County Circuit Court issued its *ex parte* temporary injunction late in the afternoon on Friday, October 22, 1993. This injunction immediately shut down distribution of hundreds of thousands of voter guides on the second weekend prior to the election, when distribution at Sunday church services was to have been the principal distribution mechanism. On the following Wednesday, October 27, the state court not only refused to dissolve the temporary injunction, it granted the Democratic Party's motion to make it permanent and broaden its scope. On Thursday, October 28, Petitioners sought federal relief, and on Friday, October 29, they appealed to the Virginia Supreme Court, which dissolved the injunction the day before the election. In the meantime, as counsel was retained, legal motions and briefs drafted, and appellate remedies pursued, the injunction had the *"immediate and irreversible sanction," Nebraska Press Ass'n*, 427 U.S. at 559, 96 S. Ct. at 2803

(emphasis added), of silencing core political speech as the election campaign drew to a close.[8]

Because prior restraints of core political speech impose silence when the protection offered by First Amendment is at its zenith, such prior restraints are antithetical to the structural role the First Amendment plays in preserving self-government. This Court should grant certiorari for the purpose of deciding whether the system of prior restraints established by Virginia law and challenged in this case is *per se* unconstitutional under the First Amendment because it permits prior restraints of core political speech – speech which by definition must fall outside the "narrow categories" where prior restraints might be permissible.[9]

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[8] In contrast to violations of a statute, where the unconstitutionality of the statute may successfully be asserted as a defense, under the collateral bar rule an injunction's unconstitutionality provides no defense to a violation of the injunction. *See Walker v. City of Birmingham*, 388 U.S. 307, 87 S. Ct. 1824 (1967) (upholding contempt conviction for violations of court order). As one commentator has observed, "[b]ecause of the consequences of the 'collateral bar rule' and the power of contempt of court as a punishment for disobedience of court orders, *judicially imposed prior restraints have an uncommonly potent capacity to infringe on First Amendment rights.*" R. SMOLLA, SMOLLA AND NIMMER ON FREEDOM ON SPEECH: A TREATISE ON THE FIRST AMENDMENT § 8.02[2] at 8-16 (1994) (emphasis added).

[9] Although neither the District Court nor the Court of Appeals reached the merits of Petitioners' prior restraint challenge, this Court may reach this purely legal issue if it reverses the Court of Appeals on the threshold ripeness issue. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23, 102 S. Ct. 2690, 2698 n.23 (1982).

Virginia is not the only state plagued by election laws that tempt candidates and political parties to use state court injunctions to gag their opponents at election time. In Wisconsin, state trial courts recently enjoined an issue advocacy group from broadcasting radio and television commercials that discussed the voting records of Wisconsin legislators running for reelection. As in Virginia, the basis for the injunctions were alleged violations of the state election law for failing to register with a state agency. The Wisconsin appellate courts *upheld* the injunctions of core political speech. *See State of Wisconsin ex rel. WMC Issues Mobilization Council, Inc. v. Circuit Court for Dane County*, No. 96-3133-W (Wis. App. 1st & 4th Dist. November 8, 1996). In other states, state court injunctions of core political speech for alleged election law violations have ultimately been overturned on appeal, but only after opportunities for timely speech were irretrievably lost. *See, e.g., Republican Party of Florida v. Florida Elections Comm'n*, 658 So. 2d 653 (Fla. Dist. Ct. App. 1995); *Guste v. Connick*, 515 So. 2d 436 (La. 1987).

These cases demonstrate the necessity for this Court to declare what its cases imply: Prior restraints of core political speech concerning candidates, issues, and elections are *per se* unconstitutional under the First Amendment rather than merely presumptively unconstitutional. Any violations of otherwise constitutional election laws can be addressed after-the-fact with appropriate civil or criminal penalties. *See Southeastern Promotions*, 420 U.S. at 559, 95 S. Ct. at 1247 ("[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.").

III. This Court Should Decide the Important Question of Whether the *Rooker-Feldman* Doctrine Bars Federal Jurisdiction over Damages Claims Arising out of State Court Injunctions That Were Overturned in the State Court System.

The Court of Appeals held that the *Rooker-Feldman* doctrine barred federal jurisdiction over damages claims arising out of the underlying state court injunctions, all of which were overturned on direct appeal, vacated, or lapsed prior to the commencement of this action. Under the court's broad holding, a federal court lacks jurisdiction to entertain *any* claim for damages arising out of overturned state court judgments, regardless of whether those claims are grounded in § 1983 or in state law causes of action for malicious prosecution, because "the federal district court would be required to determine that the state courts' decisions were wrong." App. 51; 122 F.3d at 202.

Rooker-Feldman, which is derived from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct 149 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303 (1983), is an "abstention doctrine, under which a party *losing* in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court, based on the *losing* party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06, 114 S. Ct. 2647, 2654 (1994) (emphasis added). It is a doctrine of statutory construction, based on the distinction between the appellate jurisdiction of the Supreme Court under 28 U.S.C. § 1257 and the original jurisdiction of district courts under 28 U.S.C. § 1331. *See ASARCo Inc. v. Kadish*, 490 U.S. 605, 623, 109 S. Ct. 2037, 2048 (1989) (*Rooker-*

Feldman is a "construction of 28 U.S.C. § 1257"); *see also Feldman*, 460 U.S. at 476, 103 S. Ct. at 1311.

Because Petitioners *succeeded* in overturning the underlying injunctions, *Rooker-Feldman* does not bar federal jurisdiction over Petitioners' claims for damages. Simply put, there are no *outstanding* judgments or injunctions that would be called into question by Petitioners' prevailing on their § 1983 and state law claims. By definition, the collateral attack or appellate review prohibited by the *Rooker-Feldman* doctrine presupposes an *outstanding* state court judgment or order to be attacked or reviewed. Absent such an *outstanding* state order or judgment, an action for § 1983 damages arising out of an overturned state court order or judgment is within a federal district court's original jurisdiction under 28 U.S.C. § 1331.

This Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994), implicitly recognized this exception to the *Rooker-Feldman* doctrine. In *Heck*, an incarcerated plaintiff sought § 1983 damages for his allegedly unconstitutional state court conviction. This Court, citing *Rooker* and other cases that bar federal court collateral attacks on state court judgments, held that such a § 1983 action for damages was analogous to a malicious prosecution claim and could proceed in federal court only if the plaintiff proved that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87, 114 S. Ct. at 2372.

In other words, as Petitioners contended in the District Court and the Court of Appeals, *Heck* permits § 1983 actions based on state court judgments that are

overturned in the state court system prior to the commencement of the federal action. Judge Easterbrook recently put it this way: Under *Rooker* and *Heck*, if a state court judgment is "set aside" in the state court system, a § 1983 damages claim can "then and only then" be asserted "against the persons responsible" for the judgment. *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995).

The District Court in this case ignored *Heck*. The Court of Appeals addressed *Heck* and Judge Easterbrook's dictum in *Homola* as follows:

> In *Heck*, the Court reiterated its view that the *Rooker-Feldman* doctrine does not serve to bar a plaintiff's action that "will *not* demonstrate the invalidity of any outstanding criminal judgment. . . ." The Court stressed, however, that the doctrine will serve as a bar if plaintiff's action requires the district court to *"necessarily imply the invalidity of his conviction or sentence. . . ."* *Heck*, 512 U.S. at 487, 114 S. Ct. at 2372 (emphasis added). Similarly, in *Homola*, the Seventh Circuit reiterated the tenets of the *Rooker-Feldman* doctrine. *See Homola*, 59 F.3d at 650. Neither of those cases stand for the proposition that once a state court decision has been reversed or modified, a federal district court may now pass upon the validity of that judgment, which is precisely what the district court recognized [that Petitioners] sought to do.

App. 49-50; 122 F.3d at 201 (emphasis by the Court, footnote omitted).

What follows is the full passage from *Heck* that the Court of Appeals selectively quoted. Note that the underlined language is what the Court of Appeals quoted, and that the bold-faced language is the dispositive language from the *same sentence* that the Court of Appeals omitted and replaced with an ellipsis:

> Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; **if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated**. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed in the absence of some other bar to the suit.

Heck, 512 U.S. at 487, 114 S. Ct. at 2372-73 (footnotes omitted).

Manifestly, in selectively quoting *Heck*, the Court of Appeals omitted the salient language from *Heck* that recognizes the relevant exception to *Rooker-Feldman*. *Heck* is clear: If "the plaintiff can demonstrate that the conviction or sentence has already been invalidated," a § 1983 claim can proceed, even if judgment in favor of the § 1983 plaintiff would "necessarily imply the invalidity of his [since overturned] conviction or sentence." *Id.* Although *Heck*'s holding was in the context of § 1983 damages claims arising out of state court *criminal*

judgments, *Heck*'s rationale applies equally to § 1983 and state law malicious prosecution claims arising out of *civil* judgments that are overturned prior to the commencement of the federal action.

The Court of Appeals' holding cannot be reconciled with this Court's rationale in *Heck* and Judge Easterbrook's dictum in *Homola*. Indeed, under the broad holding of the Court of Appeals, the *Rooker-Feldman* doctrine bars a federal court from exercising jurisdiction over a *state law* claim for malicious prosecution arising out of an overturned state court judgment, because such an action would require the federal court to review the overturned state court judgment. This cannot be the law. This Court should grant certiorari to resolve this important question of federal jurisdiction.

IV. This Court Should Resolve the Conflict in the Circuits over Whether a State Court Injunction is a Legislative or Judicial Act for Purposes of the *Rooker-Feldman* Doctrine.

Rooker-Feldman does not bar federal district court review of state court orders that are "legislative" rather than "judicial" in character. *Feldman*, 460 U.S. at 476-77, 103 S. Ct. at 1311-12. The Court of Appeals in this case held that the underlying state court injunctions were judicial rather than legislative acts. App. 47-49; 122 F.3d at 200-01.

In *Feldman*, this Supreme Court outlined the distinction between a court's "judicial" and "legislative" actions:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. *Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.*

Feldman, 460 U.S. at 477, 103 S. Ct. at 1312 (emphasis added) (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 69 (1908)). *See also Lathrop v. Donohue*, 367 U.S. 820, 824, 81 S. Ct. 1826, 1828 (1961) ("Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State. . . .") (citation and internal quotation marks omitted); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 258, 55 S. Ct. 197, 202 (1934) (legislation includes "every act . . . to which the state gives sanction, no distinction being made between acts of the state Legislature and other exertions of the state lawmaking power"); *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 104, 48 S. Ct. 489, 490 (1928) ("legislation consists of rules having continuing force and intended to be observed and applied in the future; and this regardless of the state agency from which it proceeds").

Applying these principles, at least two federal courts of appeals have observed that state court injunctions are fundamentally legislative in character. *See Hoover v. Wagner*, 47 F.3d 845, 849 (7th Cir. 1995) (without deciding the issue, noting that state court "[i]njunctions often do function quite like statutes" for purposes of *Rooker-Feldman* analysis); *Cheffer v. McGregor*, 6 F.3d 705, 708 (11th Cir. 1993), *vacated on other grounds*, 41 F.3d 1421 (11th Cir. 1994) (en banc) (finding state court injunction to be statutory in character); *Henson v. East Lincoln Twp.*

814 F.2d 410, 416 (7th Cir. 1987), *cert. dismissed*, 506 U.S. 1042, 113 S. Ct. 1035 (1993) (injunction that corresponds to a statute for bringing about general compliance with the law is "legislative"). The decision of the Court of Appeals in this case conflicts with these decisions, and this Court should grant certiorari to resolve this conflict in the circuits.

V. This Court Should Resolve the Conflict in the Circuits Whether the *Rooker-Feldman* Doctrine Bars Federal Jurisdiction over § 1983 Damages Claims Arising out of *Ex Parte* Temporary Injunctions.

Petitioners alleged that the underlying temporary injunctions were initiated *ex parte*. *See* First Amended Complaint, ¶¶ 25, 34, 50, & 51. In the case of the 1989 and 1993 Fairfax injunctions, *after* the entry of the *ex parte* temporary injunctions, those courts held hearings where Petitioners could be heard and move for the injunctions' dissolution. First Amended Complaint, ¶¶ 40, 60. Because the Respondents' motion to dismiss for lack of subject-matter jurisdiction challenged the facial sufficiency of Petitioners' First Amended Complaint, the Court of Appeals was obliged to accept these allegations as true, construing them most favorably to Petitioners, and not to look beyond the face of the complaint to determine jurisdiction. 2 MOORE'S FEDERAL PRACTICE, § 12.30[4], at 12-38 (3d ed. 1997).

The Court of Appeals held that because two[10] of the state courts (eventually) held hearings where Petitioners had the opportunity to be heard, and because state law provided for a right of appeal of the *ex parte* temporary injunction orders, the *Rooker-Feldman* doctrine barred Petitioners' § 1983 damages claims based on the entry of the initial, *ex parte* restraining orders. App. 53; 122 F.3d at 203 n.11. This decision conflicts with the decisions of other circuits, which hold that *ex parte* state court orders are the proper subjects of collateral attack in federal court, notwithstanding the *Rooker-Feldman* doctrine. *See Homola*, 59 F.3d at 651 (*ex parte* state court orders are "open to limited collateral attack" in federal court); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902, 106 S. Ct. 3269 (1986) (*Rooker-Feldman* does not bar federal action where there was no "full and fair opportunity" to contest state court order); *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996) (*Rooker-Feldman* does not apply "when the plaintiff had no reasonable opportunity to raise his federal claim in state proceedings").

An *ex parte* injunction of speech violates due process and the First Amendment. *Carroll*, 393 U.S. at 180, 89 S. Ct. at 351. Even if there is an after-the-fact opportunity to seek dissolution of the injunction, either by motion or appeal, the Constitution has already been violated because there was no full and fair opportunity to contest the *ex parte* injunction at the outset. This Court should grant certiorari in this case to resolve the important question of whether the *Rooker-Feldman* doctrine precludes a federal district court from providing redress for such constitutional violations.

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[10] In 1989, the Circuit Court for the City of Richmond held no hearing after granting its *ex parte* temporary injunction.

VI. If This Court Should Otherwise Review the Court of Appeals' Decision, This Court Should Also Review the Court of Appeals' Affirmance of the District Court's Dismissal of Petitioners' State Law Claims.

If the District Court's dismissal of the Petitioners' § 1983 claims for lack of federal jurisdiction was erroneous, it is indisputable that the District Court lacked discretion under 28 U.S.C. § 1367(c)(3) to dismiss Petitioners' state law claims. Although this issue is plainly not "certworthy" standing alone, should this Court grant certiorari on the other substantial questions presented, it should grant certiorari on this question as well so that if the decision of the Court of Appeals is reversed in any respect, a remand to the District Court will include a reinstatement of the Petitioners' state law claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

November 20, 1997

Respectfully submitted,

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VIRGINIA SOCIETY FOR HUMAN LIFE, INC., et al., Plaintiffs,
v.
Donald S. CALDWELL, et al., Defendants.

Civ. A. No. 95-1042-R.

United States District Court,
W.D. Virginia,
Roanoke Division.

Oct. 30, 1995.

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CORRECTED MEMORANDUM OPINION

WILSON, District Judge.

Plaintiffs, Virginia Society for Human Life, Inc. ("VSHL"), and Andrea Sexton, bring this action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 for infringement of their rights to freedom of speech in violation of the First and Fourteenth Amendments to the United States Constitution. VSHL is a nonprofit, nonstock, public interest corporation that purportedly engages in "issue advocacy" in Virginia through the

preparation and distribution of "voter guides."[1] Sexton is a Virginia resident who distributes those guides in Virginia at her own expense. Defendants are Virginia's Commonwealth's Attorneys and members of the State Board of Elections charged with enforcing Virginia's election laws.[2] VSHL and Sexton maintain that various provisions of Virginia's Campaign Finance Disclosure Act, VA.CODE Ann. §§ 24.2-901 to 24.2-930 (1993), are overly broad and chill their free speech rights. They seek a declaratory judgment declaring the challenged provisions unconstitutional, and they seek to enjoin defendants from enforcing those provisions. Defendants contend that the challenged provisions do not apply to VSHL and Sexton and that the relief sought should be denied. The court finds that the challenged provisions arguably apply to VSHL and Sexton and have a chilling effect on their freedom of speech, if not narrowed by construction. Because a narrow reading could cure constitutional infirmity in two of the challenged provisions, this court, in the interest of avoiding potentially unnecessary constitutional adjudication and in the interest of federalism and comity, will submit issues of state statutory construction involving these provisions to the Virginia Supreme Court. In the meantime, however, this court will preliminarily enjoin enforcement of the challenged provisions.

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[1] *See* Appendix 3(A)(i); 3(A)(ii); 3(B).

[2] Named defendants are Donald S. Caldwell, Pamela M. Clark, Dr. George M. Hampton, and Bruce Meadows. The Commonwealth's Attorneys for the Commonwealth of Virginia have been certified as a defendant class pursuant to Federal Rule of Civil Procedure 23 in accordance with the court's order dated October 11, 1995.

I.

VSHL and Sexton challenge three sections of Virginia's Campaign Finance Disclosure Act, VA. CODE Ann. § 24.2-908, § 24.2-910, and § 24.2-1014.[3] Section 24.2-908 requires, with certain exceptions, "each person and political committee which anticipates receiving contributions or making expenditures in excess of $100" to file a "statement of organization" with the State Board of Elections detailing organizational, identifying and financial information. Section 24.2-910 requires persons and organizations subject to § 24.2-908 to maintain records and file disclosure reports. It also requires, in part, persons and political committees making "independent expenditures" to maintain records and report "contributions" received and "expenditures" made of:

> 1. Any funds, in the aggregate, in excess of $500 for a statewide election or $100 for any other election expended for the purpose of influencing the outcome of any election;
> 2. Any funds in any amount expended to publish or broadcast to the public any material referring to a candidate by name, description, or other reference and (i) advocating his election or defeat, (ii) setting forth his position on any public issue, voting record, or other official acts, or (iii) otherwise designed to influence individuals to cast their votes for or against him or to withhold their votes from him; and
> 3. Any funds in any amount expended to publish or broadcast to the public any material promoting or opposing a question submitted to the voters in a referendum.

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[3] *See* Appendix 1(A); 1(B); 1(C); 1(D).

VA.CODE Ann. § 24.2-910.

The third challenged section, § 24.2-1014, makes it unlawful "to cause any writing . . . to appear concerning any potential nominee or candidate, or concerning any question to be submitted to the voters unless such writing plainly identifies the person responsible for it," § 24.2-1014(B), and if that person is required to file a statement of organization under § 24.2-908, the writing must contain a registration number provided by the State Board of Elections. § 24.2-1014(B)(3).

On several occasions, state circuit courts have not only broadly construed similar provisions of the predecessor to Virginia's Campaign Finance Disclosure Act, the Fair Election Practice Act, VA.CODE Ann. §§ 24.1-252 to 24.1-263.1 (repealed 1993), but also have relied on those similarly worded provisions to impose unconstitutional prior restraints. In 1989, for example, Virginia held elections for Governor, Lieutenant Governor, Attorney General, and the General Assembly. The Virginia Leadership Council ("VLC"), an unincorporated association consisting of various Virginia citizens, prepared over one million voter cards comparing the political positions taken by the major parties' candidates. On November 4, 1989, three days before the election, a judge of the Circuit Court of the City of Richmond enjoined VLC and an individual "from distributing any literature of a political nature without first identifying by name and address the person causing the literature to be distributed, and including on any literature distributed the required authorization statement."[4] By its terms, the injunction expired after the election.

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[4] *See* Appendix 2(A)(i).

In connection with the 1989 elections, the "Committee for Providing Truth in Political Candidate Positions," an unincorporated association in Fairfax County, Virginia, consisting of various Fairfax County residents, prepared a handbill entitled "Read Before You Vote." The Democratic Party of Virginia ("DPV"), brought suit against that association and the VLC seeking an injunction. The day before the election, the Circuit Court of Fairfax County issued an unconstitutional prior restraint enjoining them from distributing or causing to be distributed the "Read Before You Vote" handbills and the "Leadership '89 Voter Cards" as well as "any other materials or publications or writings as defined in 24.1-277."[5] The injunction was effective "until such time as the defendants ***1074** [could] demonstrate to the Court compliance with the law."[6]

In 1993, elections were held again for Governor, Lieutenant Governor, Attorney General, and the General Assembly. Following a similar pattern, the Circuit Court of Fairfax County entertained a suit shortly before the election to enjoin distribution of certain handbills. On October 27, 1993, the Circuit Court enjoined the defendants "from distributing any writing about candidates for any office elective . . . without first filing a statement of organization with the [Virginia State] Board [of Elections]" and identified on the writing "the person responsible therefor" and the registration number.[7] The Virginia

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[5] *See* Appendix 2(B).

[6] *Id.*

[7] *See* Appendix 2(C).

Supreme Court dissolved the injunction on November 1, 1993, without opinion.[8]

VSHL and Sexton now maintain that they would like to distribute voter guides that are equivalent to voter guides found unlawful and enjoined in connection with the 1989 and 1993 elections. However, they are concerned that they would be subject to civil and criminal penalties if their voter guides do not conform with Virginia law as that law has been applied by Virginia's circuit courts. On October 11, 1995, this court held a hearing on VSHL's and Sexton's motion for a preliminary injunction to enjoin enforcement of the challenged provisions. At the conclusion of the hearing, the court took the motion for preliminary injunction under advisement and issued a temporary restraining order restraining application of the challenged provisions to VSHL and Sexton, except in the case of "express advocacy for the election or defeat of a specific candidate." *Virginia Society for Human Life, Inc. v. Caldwell*, Civil No. 95-1042-R, (W.D.Va. Oct. 11, 1995) (temporarily enjoining enforcement of challenged statutes).

II.

Federal courts should abstain from deciding constitutional claims if a state court's interpretation of an unclear state statute might eliminate the constitutional issue. *Railroad Comm'n v. Pullman*, 312 U.S. 496, 61

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[8] Defendants in the Fairfax County Circuit Court action filed suit in the United States District Court for the Eastern District of Virginia immediately following the Circuit Court's injunction. The district court dismissed the suit on the authority of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971). The Court of Appeals concluded that abstention was proper. *See Family Foundation, Inc. v. Brown*, 9 F.3d 1075 (4th Cir.1993).

S. Ct. 643, 85 L.Ed. 971 (1941); *Educational Serv., Inc. v. Maryland State Bd. for Higher Educ.*, 710 F.2d 170 (4th Cir.1983). Defendants maintain that the challenged provisions do not apply to pure issue advocacy, and thus, injunctive relief is unnecessary as to plaintiffs' "voter guides."[9] In any event, defendants urge the court to submit constitutional questions to the Virginia Supreme Court. VSHL and Sexton respond that the provisions apply to them and that similar provisions of predecessor statutes have been broadly applied by the Virginia circuit courts to enjoin "issue advocacy," thus chilling their freedom of speech. They claim the challenged provisions are excessively overbroad, that no construction can save them, and that this court should declare them unconstitutional.

This court rejects the course of action suggested by each side. First, as to defendants' suggested course of action, Pullman counsels abstention, not abdication. The challenged provisions are arguably overbroad, and that potential overbreadth has been burdened further by the unhelpful constructions of various state circuit courts that have chilled First Amendment speech and imposed unconstitutional prior restraints. The constitutionality of the provisions is properly challenged in federal court, and the court cannot fulfill its responsibility by sending that constitutional challenge elsewhere. Pullman and federalism counsel that issues of state statutory construction, but not constitutional interpretation, be submitted to the Virginia Supreme Court. Second, as to plaintiffs' suggested ***1075** course of action, this court has

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[9] In a recent opinion letter, the Attorney General of the Commonwealth of Virginia narrowly construed VA.CODE Ann. § 24.2-1014, as he now urges this court to do. (Opinion Letter from Attorney General of the Commonwealth of Virginia to M. Bruce Meadows, July 13, 1995.)

concluded that there are narrow constructions that the Virginia Supreme Court might place on § 24.2-908 and § 24.2-910 that would eliminate some constitutional issues. Under such circumstances, the court is satisfied that the provident course is to certify the issues of state statutory construction to the Virginia Supreme Court and, while awaiting that court's response, narrow application of the provisions by preliminary injunction. *See Roe v. Alabama*, 43 F.3d 574 (11th Cir.1995).

VA.CODE Ann. § 24.2-908

At first blush, § 24.2-908 appears to apply to organizations engaged in pure issue advocacy and not simply electioneering. The "statement of organization" required by § 24.2-908, however, is tied to the receipt of contributions or the making of expenditures "for the purpose of influencing the outcome of an election." *See* § 24.2-901.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976), the United States Supreme Court narrowly construed the language "for purpose of influencing the outcome of an election" contained in the Federal Election Campaign Act, by tying it to a major purpose of the Act's disclosure provision--"to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," and thereby, avoided its application to "groups engaged purely in issue discussion." *Id.* at 79, 96 S. Ct. at 664.[10] It is

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[10] "Buckley adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249, 107 S. Ct. 616, 623, 93 L.Ed.2d 539 (1986). This court recognizes that the line between "issue advocacy" and advocacy

conceivable that the Virginia Supreme Court might do likewise with § 24.2-908. It would be incongruous for federal courts to narrowly construe the Federal Election Campaign Act so as to avoid constitutional challenge and then reach out and invalidate Virginia's Campaign Finance Disclosure Act without submitting pivotal statutory construction issues to the Virginia Supreme Court.

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for the election or defeat of a candidate will often be a hard line to draw. But given the clash between the First Amendment and the states' strong interest in ensuring that elections are fair and open to real public scrutiny, lines must be drawn.

VSHL argues that § 24.2-908 and § 24.2-910 cannot be applied to an organization that has issue advocacy as its primary purpose. Indeed, the Court of Appeals for the D.C. Circuit intimated that the Federal Election Commission avoided a serious "First Amendment issue of the sort seen in cases like *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 1170-71, 93 L.Ed.2d 1488 (1958)," when it applied "the major purpose test" to the "core purpose of the organization itself, [and] not the individual expenditure or contribution." *Akins v. Federal Election Comm'n*, 66 F.3d 348, 355 (D.C.Cir.1995). The D.C. Circuit's conclusion, however, might be somewhat at odds with the Supreme Court's reasoning in *Buckley*. "The *Buckley* court concluded that the disclosure of a group's independent campaign expenditures serves the important governmental interest of 'shed [ding] the light of publicity' on campaign financing, thereby helping voters to evaluate the constituencies of those who seek federal office. As a result, the burden of disclosing independent expenditures generally is 'a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.'" *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 265, 107 S. Ct. 616, 632, 93 L.Ed.2d 539 (1986) (O'Connor, J., concurring in part and concurring in the judgment and quoting *Buckley*, 424 U.S. at 81-82, 96 S. Ct. at 664-665) (citations omitted).

VA.CODE Ann. § 24.2-910

Section 24.2-910 appears facially overbroad when read apart from the definitions of § 24.2-901. The disclosure requirements complained of, however, are once again tied to the receipt of "contributions" and the making of "expenditures," § 24.2-910(B), "for the purpose of influencing the outcome of an election." *See* § 24.2-901(A). Therefore, just as a narrow statutory construction of § 24.2-908 might eliminate the constitutional issues presented in the challenge to that section, narrow construction of § 24.2-910 might eliminate the constitutional issues presented in the challenge to that section as well.

VA.CODE Ann. § 24.2-1014

The challenge to § 24.2-1014 is more problematic in light of *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 115 S. Ct. 1511, 131 L.Ed.2d 426 (1995). *McIntyre* ***1076** presented the question of whether an Ohio statute that prohibited the distribution of anonymous campaign literature was "a 'law . . . abridging the freedom of speech' within the meaning of the First Amendment." *McIntyre*, 514 U.S. at ----, 115 S. Ct. at 1514. McIntyre opposed an imminent referendum on a proposed school tax levy and distributed leaflets at a public meeting at an Ohio middle school. She composed and printed the text of the leaflets on her home computer and paid a professional printer to make additional copies. Some of the leaflets identified her as the author and others simply purported to be from "Concerned Parents and Tax Payers." All of the leaflets urged the voters to "vote no" on the referendum. The Ohio Elections Commission found that McIntyre's distribution of unsigned leaflets violated Ohio election law and imposed a $100 fine. The Ohio Supreme Court rejected McIntyre's

constitutional challenge to the statute. The Supreme Court granted certiorari and reversed.

The Court traced the essential role of anonymous speech, finding that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at ----, 115 S. Ct. at 1516. According to the Court, "[t]he freedom to publish anonymously extends beyond the literary realm" to political speech. *Id.* at ----, 115 S. Ct. at 1516. The Court then determined that the statute involved placed a limitation on "core political speech" that was subject to "exacting scrutiny" and that could survive only if "narrowly tailored" to serve an overriding state interest. *Id.* at ----, 115 S. Ct. at 1519.

Ohio sought to justify the statute stating that it advanced the state's interest in "preventing fraudulent and libelous statements and its interest in providing the electorate with relevant information." *Id.* at ----, 115 S. Ct. at 1519. The Court concluded that the statute accomplished neither purpose advanced by the state and was unconstitutionally overbroad:

> As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election,

> when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity.

Id. at ----, 115 S. Ct. at 1521-22 (footnotes omitted).

Practically speaking, § 24.2-1014(B) is indistinguishable from the statute struck down in *McIntyre* and cannot, in its entirety, survive exacting scrutiny. Although the court finds important distinctions between anonymous pamphleteering in connection with a referendum and anonymous pamphleteering in connection with an election, § 24.2-1014(B) applies to both. Moreover, under § 24.2-1014(B)(3)(b) it is "unlawful for any person to cause any writing . . . to appear concerning any potential nominee or candidate . . . unless such writing plainly identifies the person responsible for it." The provision makes no pretense of limiting itself to electioneering. Therefore, although *Pullman* counsels abstention as to § 24.2-908 and § 24.2-910, the reach of § 24.2-1014(B)(3)(b) is clear, and it does not survive "strict scrutiny."

III.

The standard for preliminary injunctions in this circuit was established in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir.1977). Four factors must be considered:

1. the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;
2. the likelihood of harm to the defendant if the injunction is granted;

3. the likelihood that the plaintiffs will succeed on the merits; and
4. the public interest.

*1077 *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir.1991). These factors are not weighted equally. The "balance of hardships," determined by comparing the relevant harms to the parties, is the most important determination. *Hughes Network Sys. v. Interdigital Communications Corp.*, 17 F.3d 691 (4th Cir.1994). The determination of the balance of harms will dictate how strong a likelihood of success the plaintiffs must show. *Id.* Applying the Blackwelder standard, the court finds that the balance of harms weighs greatly in favor of the plaintiffs, that plaintiffs have shown serious questions for decision, and that the issuance of an injunction would serve the public interest. Accordingly, the court will enter the preliminary injunction.

When an individual's free speech rights are infringed, irreparable harm is generally inflicted. *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). In this case, the chilling effect of a broad reading of the challenged provisions is clear, and constitutes irreparable harm.

The degree of harm to be suffered by the defendants, should an injunction issue, is extremely slight. Defendants have articulated no lasting harm, and the only harm apparent would be that voters in this year's elections would have minimally less information about the origins of "issue advocacy" literature distributed during election season. Moreover, defendants assert that the challenged provisions do not even apply to the "issue advocacy" in which VSHL and Sexton seek to engage. Thus, the balance of harms between the injury to plaintiffs' First Amendment

freedoms and the negligible harm to defendants, tips dramatically in favor of VSHL and Sexton.

When the balance of harms greatly favors the plaintiffs, as here, they need only show "grave or serious" questions for ultimate decision. *L.J. By and Through Darr v. Massinga*, 838 F.2d 118, 120 (4th Cir.1988), *cert. denied*, 488 U.S. 1018, 109 S. Ct. 816, 102 L.Ed.2d 805 (1989). Given the substantial questions of the constitutionality of the challenged Virginia statutes discussed in Part II, above, the court concludes that plaintiffs have met this burden of showing serious issues for decision by the court.

The public interest is the last factor to be considered, and it too, points to the issuance of an injunction in this case. Given the importance of core political speech and the possible chilling effect of the statutory scheme, the court concludes that an injunction limiting enforcement of the relevant statutes would be in the public interest.

IV.

For the reasons stated, the court will enter a preliminary injunction enjoining the enforcement of § 24.2-908 and § 24.2-910, as indicated above, as applied to VSHL and Sexton. The court also will enjoin enforcement of § 24.2-1014(B)(3)(b) as to any person.

ORDER

October 21, 1995

In accordance with the Memorandum Opinion entered this day the court finds that plaintiffs, Virginia Society for Human Life, Inc. and Andrea Sexton will be

irreparably harmed were preliminary injunction not to issue, that defendants will not be irreparably harmed by the issuance of a preliminary injunction, that plaintiffs have shown a likelihood of success on the merits, and that the public interest will be served by the court's injunction. Accordingly, it is hereby

ORDERED AND ADJUDGED

that

(1) All named defendants and the defendant class, all Commonwealth's Attorneys for the Commonwealth of Virginia, are hereby enjoined from enforcing the following provisions of the Virginia Code ***1078** as to VSHL and Sexton pending final judgment on the merits of this case:

(a) Virginia Code § 24.2-908, except as to contributions and expenditures for express advocacy of the election or defeat of a specific candidate;

(b) Virginia Code § 24.2-910, except as to contributions received and expenditures made for express advocacy of the election or defeat of specific candidate;

(2) All named defendants and the defendant class, all Commonwealth's Attorneys for the Commonwealth of Virginia, are hereby enjoined from enforcing the following provisions of the Virginia Code pending final judgment on the merits of this case:

(a) Virginia Code § 24.2-1014(B)(3)(b).

(3) Bond for the preliminary injunction is set in the amount of $250 per plaintiff to be posted within five days.

Vern T. JORDAHL, et al., Plaintiffs,
v.
The DEMOCRATIC PARTY OF VIRGINIA, et al., Defendants.

Civil Action No. 95-1043-R.

United States District Court,
W.D. Virginia,
Roanoke Division.

Oct. 3, 1996.

***237** Donald Wise Huffman, Donald W. Huffman & Associates, P.C., Roanoke, VA, M. Miller Baker, Brian M. Tauscher, Matthew J. Cuccias, Carr, Goodson & Lee, P.C., Washington, DC, Craig Littleton Parshall, Fredericksburg, VA, James Bopp, Jr., Richard E. Coleson, Bopp, Coleson & Bostrom, Terre Haute, IN, for plaintiffs Vern T. Jordahl, Mary-Beth LaRock, Virginia Leadership Council.

John Hardin Young, Falls Church, VA, Gail Starling Marshall, Rapidan, VA, Melissa Walker Robinson, Jason G. Moyers, Gentry, Locke, Rakes & Moore, Roanoke, VA, Jay B. Myerson, Reston, VA, Rebecca Claire Guthrie, Richmond, VA, for defendants Democratic Party of Virginia, Chester A. Roberts, Richmond City Democratic Committee.

Alice Ann Berkebile, James Walter Hopper, James S. Gilmore, III, Office of Attorney General, Richmond, VA, for intervenor-defendant Commonwealth of Virginia.

CORRECTED MEMORANDUM OPINION

WILSON, District Judge.

This is an action pursuant to 42 U.S.C. § 1983 by plaintiffs, Vern T. Jordahl, Mary-Beth LaRock, and the Virginia Leadership Council, against defendants, the Democratic Party of Virginia ("DPV"), the Richmond City Democratic Committee, and other unnamed persons, for allegedly using state statutes and judicial proceedings to suppress political speech in violation of the First and Fourteenth Amendments to the United States Constitution.[1] Plaintiffs also assert ***238** various state law claims under the court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367. DPV has moved to dismiss on various grounds.[2] The Commonwealth of Virginia has moved to intervene pursuant to 28 U.S.C. § 2403(b) to defend the constitutionality of Virginia's election laws should those laws be called into question in this suit, and the court has granted that motion. The court now concludes that the suit, in part, attempts to mount a collateral attack on state court judgments, an attack which this court lacks jurisdiction to hear; and, in part, assumes that Virginia courts will not follow the Constitution, an assumption that raises issues that are not ripe for decision and that conflicts with the essential tenets of federalism. The court accordingly dismisses plaintiffs' federal claims for lack of subject-matter jurisdiction and plaintiffs' state law claims for lack of supplemental jurisdiction.

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[1] Other defendants in the suit were voluntarily dismissed on March 1, 1996.

[2] Defendants argue that they were not state actors or acting under color of state law, or, alternatively, that they enjoy qualified immunity because of the uncertainty of the law. Additional grounds for dismissal include lack of jurisdiction, res judicata, collateral estoppel, statute of limitations, and laches.

I.

In 1989, Virginia held elections for Governor, Lieutenant Governor, Attorney General, and the General Assembly. The Virginia Leadership Council ("VLC") is an unincorporated association of certain Virginia citizens, which prepared and distributed voter guides for the election, comparing the political positions taken by the major parties' candidates. Vern Jordahl is a member of the VLC. Mary-Beth LaRock is a member of the Concerned Women for America ("CWA"), which prepared and distributed similar voter guides.

In connection with the 1989 elections, DPV sought an injunction against VLC and others. The day before the election, the Circuit Court of Fairfax County enjoined them from distributing voter guides and "any other materials or publications or writings as defined in [Va.Code §] 24.1-277." The injunction was effective "until such time as the defendants [in that action could] demonstrate to the court compliance with the law."[3] In a similar suit, the Circuit Court of the City of Richmond enjoined VLC and a named individual three days before the election "from distributing any literature of a political nature without first identifying by name and address the person causing the literature to be distributed, and including on any

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[3] The Fairfax County court vacated this injunction as to VLC and its members on September 30, 1994. In addition to the VLC, the injunction prohibited another citizens' association, calling itself the "Committee for Providing Truth in Political Candidate Positions," from distributing voter guides. The injunction remained in effect as to this organization and its members until March 21, 1996, after suit was filed in this court.

literature distributed the required authorization statement."[4]

In 1993, elections were held again for Governor, Lieutenant Governor, Attorney General, and the General Assembly. Following a similar pattern, shortly before the election the Circuit Court of Fairfax County entertained a suit to enjoin distribution of certain handbills. On October 27, 1993, the Circuit Court enjoined LaRock and others "from distributing any writing . . . about candidates for any [elective] office . . . without first filing a statement of organization with the [Virginia State] Board [of Elections]" and identifying on the writing "the person responsible therefor" and the registration number.[5]

Jordahl and the other plaintiffs brought this suit against DPV and the other defendants on October 2, 1995, seeking injunctive, declaratory, and compensatory relief. The court scheduled the hearing on plaintiffs' motion for preliminary injunction together with a hearing on a motion for preliminary injunction ***239** in a related case on

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[4] By its terms, this injunction expired after the election.

[5] Defendants in the Fairfax County Circuit Court action filed suit in the United States District Court for the Eastern District of Virginia immediately following the Circuit Court injunction. The District Court dismissed the suit on the authority of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971). The Court of Appeals concluded that abstention was proper. *See Family Foundation, Inc. v. Brown*, 9 F.3d 1075 (4th Cir.1993). The Virginia Supreme Court dissolved the injunction against LaRock and others on November 1, 1993, without opinion.

October 11, 1995.[6] At the combined hearing, the court announced that it would abstain from ruling on the motion for preliminary injunction in this suit while the parties sought dissolution of the 1989 Fairfax County injunction that remained in effect.[7] The Fairfax County Circuit Court dissolved its injunction and dismissed proceedings in that court March 21, 1996. Also after the October hearing before this court, the Virginia General Assembly amended the pertinent provisions of the Campaign Finance Disclosure Act.[8]

In the meantime, plaintiffs filed a nine-count amended complaint in this suit seeking injunctive, declaratory, and compensatory relief. Count One of the amended complaint alleges that various provisions of Virginia's Campaign Finance Disclosure Act, in connection with VA.CODE § 8.01-620, authorizing circuit courts to grant injunctive relief, constitute a system of prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution. Under

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[6] The related case, *Virginia Society for Human Life v. Caldwell*, 906 F. Supp. 1071 (W.D.Va.1995), challenged the constitutionality of §§ 24.2-908, 24.2-910, and 24.2-1014 of Virginia's Campaign Finance Disclosure Act.

[7] *See supra* note 3.

[8] Since the plaintiffs' alleged injury, the Virginia General Assembly has changed the statutes at issue twice. In December 1993, the Virginia Assembly repealed the Fair Election Practices Act, Va.Code §§ 24.1-1 through 24.1-282, and enacted the Campaign Finance Disclosure Act, VA.CODE §§ 24.2-100 through 24.2-1019. Then in May 1996, after plaintiffs had filed this suit, the General Assembly further amended VA.CODE §§ 24.2-901, 24.2-908, 24.2-910, and 24.2-1014. *See* Act of May 6, 1996, ch. 1042.

Count One, plaintiffs seek to restrain DPV and others "from instituting, seeking, or procuring injunctions under color of VA.CODE § 8.01-620 that restrain speech . . . allegedly in violation of VA.CODE §§ 24.2-908, 24.2-910, and 24.2-1014(B)(3)." Counts Two, Three, Seven, and Eight are 42 U.S.C. § 1983 claims for injuries allegedly caused by either the 1989 or 1993 state court injunctions. Counts Four, Five, Six, and Nine are state law claims for injuries allegedly caused by those same injunctions.

This court must first determine whether it has subject-matter jurisdiction over the issues presented.

II.

Defendants have moved to dismiss Count One on the grounds that there is no justiciable case or controversy. The court agrees. Count One mounts no facial challenge; rather, it claims that the statutes as applied constitute a system of prior restraint.[9] However, in 1996 the Virginia General Assembly amended the campaign disclosure statutes plaintiffs challenge. A challenge based on the statutes in effect at the time of plaintiffs' alleged injury would be moot because those statutes no longer exist in the same form, and a challenge based on the current statutes is premature because they have not yet been applied.

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[9] Plaintiffs cite cases involving prosecutions, threats of prosecutions, or threats of legal sanctions in which courts found and enjoined systems of prior restraint. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L.Ed.2d 584 (1963) (censorship commission); *Council for Periodical Distributors Ass'n v. Evans*, 642 F. Supp. 552 (M.D.Ala.1986) (pornography task force); *A.C.L.U. v. City of Pittsburgh*, 586 F. Supp. 417 (W.D.Pa.1984) (threat of prosecution and confiscatory sweep of news stands). There are no such actual or threatened legal sanctions in this case.

Because plaintiffs have suffered no "actual or threatened application" of the amended statutes to their activities, therefore, their claim is not ripe for adjudication under Article III. *See Renne v. Geary*, 501 U.S. 312, 320, 111 S. Ct. 2331, 2338, 115 L.Ed.2d 288 (1991) (holding challenge to state regulation of political endorsement was not ripe, absent some present threat of enforcement); *Woodall v. Reno*, 47 F.3d 656 (4th Cir.), *cert. denied*, --- U.S. ----, 115 S. Ct. 2577, 132 L.Ed.2d 827 (1995).[10] Additionally, to assume that Virginia courts will apply the recently amended statutes in a way that violates ***240** the Constitution offends basic tenets of federalism.[11] In contrast, this court's refusal to consider plaintiffs' challenge because they have presented no justiciable case or controversy "has the advantage of permitting the state courts further opportunity to construe" the statutes.

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[10] Not only is the plaintiffs' claim of prior restraint not ripe, it also strikes this court as incongruous to restrain DPV and others from litigating questions related to political campaigns. Enjoining DPV and others from seeking legal redress from the courts would be merely an unacceptable prior restraint of a different color.

[11] Plaintiffs correctly argue that the threat of enforcement and the chilling effect of that threat led this court to narrow by injunction the application of §§ 24.2-908; 24.2-910; and 24.2-1014 in *Va. Soc. For Human Life, Inc. v. Caldwell*, 906 F.Supp 1071 (W.D.Va.1995). Since that time, however, the Virginia General Assembly amended those provisions, ostensibly to narrow their reach. Moreover, this court proscribed their enforcement, not because two state circuit courts had issued prior restraints but rather because those courts had broadly construed the statutes. Given the recent amendments to the statutes involved, the evidence before this court "is insufficient to present the prior restraint issue in a 'clean-cut and concrete form.'" *Woodall*, 47 F.3d at 658 (citing *Renne v. Geary*, 501 U.S. at 322, 111 S. Ct. at 2339).

Renne, 501 U.S. at 323, 111 S. Ct. at 2339. Accordingly, the court dismisses Count One.

III.

United States District Courts lack the authority to "sit in direct review of state court decisions." *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16, 103 S. Ct. 1303, 1315 n.16, 75 L.Ed.2d 206 (1983) (quoting *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 296, 90 S. Ct. 1739, 1747, 26 L.Ed.2d 234 (1970)). *See also Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L.Ed. 362 (1923). This prohibition, which has come to be known as the *Rooker-Feldman* doctrine, extends not only to constitutional claims that were presented to or adjudicated by the state court but also to those that are "inextricably intertwined" with a state judgment. *Feldman*, 460 U.S. at 486-87, 103 S. Ct. at 1316-17. *See also Guess v. Board of Medical Examiners of N.C.*, 967 F.2d 998, 1004 n.2 (4th Cir.1992); *Leonard v. Suthard*, 927 F.2d 168, 169-170 (4th Cir.1991); *Czura v. Supreme Court of S.C.*, 813 F.2d 644, 646 (4th Cir.1987). Moreover, the *Rooker-Feldman* doctrine precludes review not only of adjudications of a state's highest court but decisions of lower state courts as well. *See Port Authority Police Benevolent Ass'n v. Port Authority of N.Y. and N.J. Police Dep't*, 973 F.2d 169, 177 (3d Cir.1992).

Plaintiffs bring suit under 42 U.S.C. § 1983 alleging damages as a result of injunctions issued against them by the lower state courts of Virginia.[12] The key issue is

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[12] In Counts Two and Three, VLC and Jordahl complain they were injured by the 1989 injunctions against them in the City of Richmond and the County of Fairfax. In Counts Seven and Eight, LaRock complains that she was injured by the 1993 injunction against her.

whether the injuries alleged by the federal plaintiffs resulted from the state court judgments or whether they are independent claims. *See Young v. Murphy*, 90 F.3d 1225, 1231 (7th Cir.1996); *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir.1996). If the state court judgment caused the plaintiffs' injuries, "lower federal courts lack jurisdiction over the claim" *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510 (7th Cir.1996); *Garry*, 82 F.3d at 1365. In this case, plaintiffs claim they were injured as a result of state court injunctions--injuries caused not by the defendants but by the actions of the state courts. While the plaintiffs complain that the defendants sought the injunctions against them, the alleged injury occurred only when the state courts granted the injunctions. Thus, the plaintiffs are essentially claiming injury at the hands of the state court. Under *Rooker-Feldman*, a federal district court may not entertain such a suit.

Plaintiffs contend that *Rooker-Feldman* does not apply because Virginia courts eventually dissolved the injunctions against them leaving no outstanding judgments subject to attack within the state court system. Consequently, because the judgments were "invalidated," plaintiffs argue this is neither an appeal of nor a collateral attack on the earlier state court judgments. The court again disagrees. *Rooker-Feldman* applies to state judicial decisions and the effects of those decisions.[13] In each case the ***241** court should determine "whether the litigant challenges the underlying procedure as unconstitutional or instead seeks review of the state court judgment in his case." *Young*, 90 F.3d at 1231. In making that determination, "the fundamental and appropriate question

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[13] It is not limited simply to judgments. Lower federal courts have no jurisdiction "over challenges to state-court decisions in particular cases arising out of judicial proceedings." *Feldman*, 460 U.S. at 486, 103 S. Ct. at 1317.

to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment." *Garry*, 82 F.3d at 1365. If plaintiff is challenging the effects of the judgment or decisions and not an independent constitutional violation, *Rooker-Feldman* applies even if the state court has vacated or modified the judgment or decision that caused these effects. On that score *Young v. Murphy*, 90 F.3d 1225 (7th Cir.1996), is instructive.

Young involved a § 1983 action against government officials, alleging civil rights violations arising out of a competency hearing. After Wellman, an elderly and wealthy client, attempted to transfer his assets to his attorney, Young, state officials moved to declare Wellman incompetent. An Illinois circuit court granted the motion and appointed a guardian. Young later succeeded in having the state declare Wellman competent. Wellman died and Young, as executor of the estate, filed a federal civil rights suit on behalf of his deceased client against the public officials involved in the original competency hearing. The district court dismissed part of the suit for failure to state a claim. The Seventh Circuit affirmed that dismissal and dismissed the remainder of the suit for lack of subject-matter jurisdiction under *Rooker-Feldman*. *Id.* at 1227. The court noted that

> [c]ases dealing with *Rooker-Feldman* generally address instances where the underlying harm alleged in the complaint has gone unrectified. In this case we are presented with a situation where Young has already rectified the consequences of the allegedly unconstitutional state proceeding through the fully litigated restoration of Wellman to full competency in state court. Therefore Young would suggest that his suit

> is neither an appeal of, nor a collateral attack upon, the earlier incompetency proceeding. But attacking the effects of that judgment is exactly what he is doing. Wellman's injury resulted from the state court judgment of incompetency and not from the alleged denial of due process. Had he prevailed in the [earlier] hearing . . . he would have had no injury and no constitutional claim to bring before the district court. Thus, Young is really claiming Wellman's injury resulted from the state court judgment rather than the due process afforded by Illinois probate courts.

Id. at 1231 (citations omitted). In this case, as in *Young*, the plaintiffs are attacking the effects of the initial state court judgment—the injunction—and not any independent action by the defendants. Because "the plaintiffs' injury stem[s] from the state judgment," *GASH Associates v. Village of Rosemont, Ill.*, 995 F.2d 726, 728 (7th Cir.1993), this court lacks subject-matter jurisdiction to review that adjudication.

Finally the plaintiffs maintain that injunctions are excepted from *Rooker-Feldman* because they are "legislative" rather than "adjudicative" acts. The Supreme Court has held that the *Rooker-Feldman* doctrine only applies to adjudications, which involve the application of existing laws to the facts of a particular case. *See Feldman*, 460 U.S. at 479, 103 S. Ct. at 1313. Legislative acts, by contrast, "[look] to the future and [change] existing conditions by making a new rule to be applied thereafter to all or some part of those subject to [their] power[s]." *Id.* at 477, 103 S. Ct. at 1312 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 53 L.Ed. 150 (1908)). Although under some circumstances an injunction

may function in a legislative manner,[14] in this case the Virginia state courts granted the injunctions because those courts determined that the plaintiffs' actions violated existing laws. An injunction under these circumstances must be considered an adjudication for the purposes of *Rooker-Feldman*.

IV.

Because the court lacks subject-matter jurisdiction over the plaintiffs' federal ***242** claims, it has no supplemental jurisdiction over the state law claims. *See* 28 U.S.C.A. § 1367(a) (West 1993) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that . . . form part of the same case or controversy. . . ." (emphasis added)). Therefore, the court dismisses Counts Four, Five, Six, and Nine for lack of jurisdiction.

V.

For the reasons stated, the court dismisses Count One for lack of jurisdiction because there is no case or controversy; Counts Two, Three, Six, and Seven for lack of subject-matter jurisdiction under the *Rooker-Feldman* doctrine; and the state law claims in Counts Four, Five, Six, and Nine for lack of original federal jurisdiction on which to base supplemental jurisdiction.

ORDER

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[14] *See Hoover v. Wagner*, 47 F.3d 845, 849 (7th Cir.1995) (noting, without deciding the issue, that "[i]njunctions often do function quite like statutes").

In accordance with this court's memorandum opinion entered on this date, it is **ORDERED** and **ADJUDGED** that defendant's motion to dismiss for lack of subject-matter jurisdiction is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

VERN T. JORDAHL, et al.	)	
Plaintiffs,	)	Civil Action
	)	No. 95-1043-R
v.	)	
	)	**ORDER**
THE DEMOCRATIC PARTY OF VIRGINIA, et al.	)	
	)	By: Samuel G. Wilson
	)	United States District
Defendants	)	Judge

In accordance with this court's memorandum opinion entered on this date, it is **ORDERED** and **ADJUDGED** that defendant's motion to dismiss for lack of subject-matter jurisdiction is granted.

ENTER this 30th day of September, 1996.

/s/
DISTRICT JUDGE

Vern T. JORDAHL; Mary-Beth Larock; Virginia Leadership Council, Plaintiffs-Appellants,

v.

DEMOCRATIC PARTY OF VIRGINIA; Richmond City Democratic Committee, Defendants-Appellees,

Commonwealth of Virginia, Intervenor-Appellee,

and

Mark R. Warner; Pixie Bell; Lawrence H. Framme, III; Chester A. Roberts; John Does, Defendants.

No. 96-2402.

United States Court of Appeals,
Fourth Circuit.

Argued June 4, 1997.

Decided July 28, 1997.

*194 **ARGUED**: M. Miller Baker, Carr, Goodson, Lee & Warner, Washington, DC, for Appellants. Monica Leigh Taylor, Gentry, Locke, Rakes & Moore, Roanoke, VA; John Hardin Young, Falls Church, VA, for Appellees. Alice Ann Berkebile, Assistant Attorney General, Office of the Attorney General, Richmond, VA, for Intervenor. **ON BRIEF**: Brian M. Tauscher, Matthew J. Cuccias, Steven F. Gatti, Carr, Goodson, Lee & Warner, Washington, DC; James Bopp, Jr., Bopp, Coleson & Bostrom, Terre Haute, IN, for Appellants. Leisa Kube Ciaffone, Gentry, Locke, Rakes & Moore, Roanoke, VA; R. Claire Guthrie, Richmond, Virginia, for Appellees. James S. Gilmore, III, Attorney General of VA, Office of the Attorney General, Richmond, VA, for Intervenor.

Before WIDENER and MURNAGHAN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by published opinion. Judge MURNAGHAN wrote the opinion, in which Judge WIDENER and Senior Judge PHILLIPS joined.

OPINION

MURNAGHAN, Circuit Judge:

In 1989 and again in 1993, the Virginia Leadership Council, Vern T. Jordahl, a member of the Virginia Leadership Council, and Mary-Beth LaRock, a member of the Concerned Women for America, prepared and sought to distribute voter guides comparing the political positions of the various candidates for the offices of Governor, Lieutenant Governor, Attorney General and General Assembly members. The voter guides did not endorse any candidate for a particular office. In both instances, the Democratic Party of Virginia sought and obtained three injunctions forbidding the plaintiffs from distributing the guides.

Thereafter, the plaintiffs sued the Democratic Party of Virginia for allegedly using state statutes and judicial proceedings to suppress political speech in violation of the First Amendment. The district court granted the Democratic Party's motion to dismiss on the grounds that the district court lacked subject matter jurisdiction over the matter. *See Jordahl v. Democratic Party of Virginia*, 947 F. Supp. 236 (W.D.Va.1996). For the reasons that follow, we affirm.

I.
FACTS AND PROCEDURAL HISTORY

The instant case centers upon three injunctions issued by the Virginia state courts. On *195 November 7, 1989, the Commonwealth of Virginia held regularly scheduled elections for Governor, Lieutenant Governor, Attorney General, and Delegates to the General Assembly. Prior to the election, the Virginia Leadership Council (VLC) and Vern Jordahl (Jordahl), a member of the VLC, prepared over one million voter guides for distribution comparing the policy positions of the various candidates for office. The voter guides did not endorse any of the candidates.

1989 Richmond Injunction

On November 4, 1989, however, the Democratic Party of Virginia (DPV) filed a Bill of Complaint in the Richmond City Circuit Court alleging that the VLC and others were violating the Virginia Fair Elections Practices Act (VFEPA), Va.Code Ann. § 24.1-251 et seq., repealed December 1, 1993.[1] On November 6, 1989, one day before the election, the Richmond Circuit court entered an order enjoining the VLC from distributing political literature "without first identifying . . . the person causing the literature to be distributed and including on any literature distributed the required authorization statement as required by § 24.1-277 of the Code of Virginia." The Order provided that the injunction automatically expired on

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[1] Specifically, the DPV alleged that the VLC failed to comply with the requirement that political committees file a statement of organization and periodic reports of contributions and expenditures. In addition, the DPV alleged that the VLC was distributing campaign literature that did not include identifying information, as is required by the VFEPA.

November 11, 1989, or upon compliance by the VLC with the statute. Subsequently, on October 11, 1994, the Richmond action was dismissed for failure to prosecute.

1989 Fairfax Injunction

On November 4, 1989, the DPV also filed suit in the Circuit Court for Fairfax County against the VLC and others, alleging that the "Read Before You Vote" pamphlet[2] and certain "Voter Cards" were being distributed in violation of the VFEPA. As its counterpart in Richmond had, the Fairfax court entered an order enjoining the VLC from distributing the "Read Before You Vote" pamphlet and "Voter Cards" until an expedited hearing on November 6, 1989, or the VLC could demonstrate its compliance with the VFEPA. Following the hearing on November 6, 1989, the Fairfax court entered an order permanently enjoining the VLC from distributing either the pamphlet or voter guides. On September 30, 1994, by stipulation of the parties, the Fairfax court entered an order dismissing the claims against the VLC as moot and dissolving the injunction with respect to the VLC and Jordahl.

1993 Fairfax Injunction

On November 2, 1993, the Commonwealth of Virginia held regularly scheduled elections for Governor, Lieutenant Governor, Attorney General, and Delegates to the General Assembly. Prior to the election, Mary-Beth LaRock (LaRock), a state representative for Concerned Women for America (CWA) prepared voters guides outlining the various candidates' positions in the upcoming

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[2] The pamphlet urged voters to "cast your vote against candidate [Linda T. "Toddy"] Puller" if "you disagree with any of these questions."

election. The voter guides did not endorse any candidate. LaRock prepared over one million of these guides and was in the process of distributing the guides when the DPV filed suit in Fairfax County Circuit Court.

Again, the DPV alleged that LaRock and others were violating the VFEPA and sought an injunction. After initially entering a temporary restraining order, the Fairfax Court entered an order permanently enjoining LaRock and others "from distributing any writing . . . about candidates for any [elective] office . . . without first filing a statement of organization with the [Virginia State] Board [of Elections]" and identifying on the writing "the person responsible therefor" and the registration number.

Following the Fairfax Court's action, LaRock and others filed suit against the Fairfax Court judge in the United States District Court for the Eastern District of Virginia. The district court dismissed the suit on the authority of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971). *See* ***196** *Family Found., Inc., et al. v. J. Howe Brown, etc.*, CA 93-1339A (E.D.Va. Oct. 29, 1993). The Fourth Circuit affirmed the district court denying LaRock and others' request for an emergency stay. *See Family Found., Inc. v. Brown*, 9 F.3d 1075 (4th Cir.1993). The Virginia Supreme Court dissolved the Fairfax court's injunction on November 1, 1993, without opinion. Thereafter, LaRock voluntarily dismissed her appeal to this court as moot. On February 7, 1994, over the objections of LaRock and others, the DPV nonsuited the 1993 Fairfax action. On April 8, 1994, the Fairfax Court vacated the order of nonsuit and dismissed the case without prejudice.

Virginia Statutes

On December 1, 1993, by a prior act of the Virginia General Assembly, the VFEPA was repealed and replaced by the Virginia Campaign Finance Disclosure Act (VCFDA), VA.CODE ANN. § 24.2-900 et seq. (Michie 1993 & Supp.1996). In 1996, the General Assembly enacted further amendments to the VCFDA, which became effective on July 1, 1996. *See* Act of May 6, 1996, ch. 1042 (further amending VA.CODE ANN. §§ 24.2-901, 24.2-908, 24.2-910, and 24.2- 1014). Specifically, the following relevant changes were made. First, in 1993, the term "political committee" was redefined to exclude 501(c)(3) corporations. *See* VA.CODE ANN. § 24.1-254.1 and VA.CODE ANN. § 24.2-901. Second, the 1996 amendments to § 24.2-1014(B) of the VCFDA added the term "clearly identified candidate" and deleted the term "potential nominee."

On October 2, 1995, the VLC filed the instant action against the DPV and other individuals, seeking compensatory and punitive damages, and injunctive and declaratory relief. The district court scheduled a hearing on plaintiffs' motion for a preliminary injunction together with a hearing for a preliminary injunction request in a related case.[3] At the combined hearing, the district court announced that it would refrain from ruling on the motions while the parties sought dissolution of the 1989 Fairfax

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[3] The related case, *Virginia Society for Human Life v. Caldwell*, 906 F. Supp. 1071 (W.D.Va.1995), challenged the constitutionality of §§ 24.2- 908, 24.2-910, and 24.2-1014 of the VCFDA.

Court injunction which remained in effect.[4] The Fairfax Court dissolved its injunction on March 21, 1996 with respect to the remaining parties.

On February 21, 1996, the VLC filed a nine-count First Amended Complaint against the DPV, seeking compensatory and punitive damages, and declaratory and injunctive relief. Counts One, Two, Three, Seven, and Eight, were brought under 42 U.S.C. § 1983. Count One alleged that various provisions of the VCFDA, in connection with VA.CODE ANN. § 8.01-620 (1992 & Supp.1996), authorizing circuit courts to grant injunctive relief, constituted a system of prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution. Counts Two, Three, Seven, and Eight are § 1983 claims for injuries caused by the two 1989 and one 1993 injunctions entered by the Richmond and Fairfax state courts. Counts Four (abuse of process), Five (abuse of process), Six (malicious prosecution), and Nine (trespass to chattels) are state law claims for injuries allegedly caused by the issuance of those same injunctions.

On March 16, 1996, the DPV filed a motion to dismiss the VLC's complaint alleging, *inter alia*, that the district court lacked subject matter jurisdiction. On June 7, 1996, the VLC filed a motion for partial summary judgment as to the federal allegations contained in Counts One, Two, and Seven and as to the state allegations in Count Nine of the complaint. On July 26, 1996, the Commonwealth of Virginia filed a motion to intervene because the VLC's complaint called into question the constitutionality of VA.CODE ANN. §§ 24.2-908, 24.2-910,

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[4] While the injunction had been dissolved against the VLC and Jordahl, the injunction still remained in effect with respect to other parties who are not parties to the instant litigation.

and 24.2-1014. The district court granted the Commonwealth's motion.

On September 30, 1996, the district court granted the DPV's motion to dismiss on the grounds that the district court lacked subject matter jurisdiction because Count One did ***197** not present an actionable case or controversy and Counts Two, Three, Seven, and Eight, the other § 1983 claims were barred under the *Rooker-Feldman* doctrine.[5] Thereafter, the district court declined to exercise supplemental jurisdiction over the remaining state law claims. The district court dismissed the action without addressing the VLC's pending motion for partial summary judgment. The VLC now appeals.

II.
DISCUSSION

Principally, the VLC challenges the district court's dismissal of its complaint on the grounds that the district court lacked subject matter jurisdiction over the complaint and the district court's failure to assert supplemental jurisdiction over the remaining state law claims. The district court's dismissal of a complaint for lack of subject matter jurisdiction is reviewed de novo. *Tillman v. Resolution Trust Corp.*, 37 F.3d 1032, 1034 (4th Cir.1994). The district court's dismissal of the state law claims under

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[5] The *Rooker-Feldman* doctrine derives its name from *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L.Ed.2d 206 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L.Ed. 362 (1923). At the motions hearing, the district court appropriately sua sponte raised the *Rooker-Feldman* issue, and received supplemental briefing from the parties on that issue. *See Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir.1996); *Garry v. Geils*, 82 F.3d 1362, 1367-68 (7th Cir.1996).

28 U.S.C. § 1367 is reviewed for abuse of discretion. *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir.1995).

A. *Count One—Lack of Actionable Case or Controversy*

The district court dismissed Count One on the basis that no justiciable case or controversy existed. The district court stated that "[c]ount One mounts no facial challenge; rather, it claims that the statutes as applied constitute a system of prior restraint." *Jordahl v. Democratic Party of Virginia*, 947 F. Supp. 236, 239 (W.D.Va.1996) (italics in original). The district court noted that in 1996 the Virginia General Assembly amended the statutes that formed the basis for VLC's challenge. As such the district court reasoned that "[a] challenge based on the statutes in effect at the time of plaintiffs' alleged injury would be moot because those statutes no longer exist in the same form, and a challenge based on the current statutes is premature because they have not yet been applied." *Id.* The district court, relying on *Renne v. Geary*, 501 U.S. 312, 320, 111 S. Ct. 2331, 2338, 115 L.Ed.2d 288 (1991), noted that the VLC presently suffers no "actual or threatened application" of the amended statutes. *Id.*

Moreover, the district court reasoned that sustaining the VLC's present challenge to as yet not applied amended statutes "assumes that Virginia courts will apply the recently enacted amended statutes in a way that violates the Constitution . . .", *id.* at 239-40, an assumption the district court noted that "offends basic tenets of federalism." *Id.* at 240. The court then dismissed Count One.

VLC's primary disagreement with the district court is the district court characterization of its claim as stating only an "as applied" challenge rather than both an "as applied" and a facial challenge to the constitutionality of

the Virginia statutes. As for the "as applied" challenge, the VLC argues that the Virginia Assembly's actions in 1993 and 1996 amending the statutes at issue were non-material changes that did not materially alter the law. The VLC maintains that "[n]either the 1993 recodification, nor the 1996 amendments to the VCFDA prevents the DPV . . . from again enforcing Va.Code [Ann.] §§ 24.2- 908, 24.2-910 and 24.2-1014 by injunctions pursuant to Va.Code [Ann.] § 8-01-620 to prevent the VLC from distributing its voter guides in the 1997 and later elections." On the facial challenge front, the VLC contends that because in Count One it alleged that the challenged provisions of the VCFDA always violate the First Amendment, Count One alleges a facial challenge as well.

The VLC's argument is not persuasive. First, the statutes have been amended and, as the district court noted, the statutes which the VLC challenged are no longer the statutes ***198** in effect in Virginia. During the course of the struggle between the VLC and the DPV, the Virginia Assembly has twice amended the challenged statutes. In fact, in 1993, the statute challenged in the instant case was repealed altogether. Furthermore, the Virginia General Assembly further amended the new statute, the VCFDA, in 1996 in response to the Supreme Court's decision in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S. Ct. 1511, 131 L.Ed.2d 426 (1995).

In *Maryland Highways Contractors Ass'n v. State of Md.*, 933 F.2d 1246 (4th Cir.), *cert. denied*, 502 U.S. 939, 112 S. Ct. 373, 116 L.Ed.2d 325 (1991), this court stated that an action is moot when it has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Id.* at 1249 (quoting *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414, 92 S. Ct. 574, 575, 30 L.Ed.2d 567 (1972)). As noted above, since the statutes have been

amended, no present, live controversy exists. Thus, the district court correctly concluded that an "as applied" challenge to the pre-amended statutes is moot. *See Renne v. Geary*, 501 U.S. 312, 320, 111 S. Ct. 2331, 2338 (1991) (holding that respondents have "failed to demonstrate a live dispute involving the actual or threatened application of [state statute] to bar particular speech."); *Woodall v. Reno*, 47 F.3d 656, 658 (4th Cir.) (dismissing case as moot because "no factual record of an actual or threatened application of the [Act's] injunctive relief provisions" existed and court would not "assume that a court would issue an injunction in violation of the well-established prior restraint doctrine"), *cert. denied*, 515 U.S. 1141, 115 S. Ct. 2577, 132 L.Ed.2d 827 (1995).

Moreover, as the district court noted an "as applied" challenge with respect to the newly amended statutes is premature. The VLC contends that the case is ripe because the DPV has not disclaimed its ability to seek to enforce the newly amended Virginia statutes against the VLC in the future. The VLC's argument is a nonstarter. The VLC is not presently subject to any injunction enforcing the VCFDA. M. Sue Wrenn Affidavit at ¶ 3. Nor has the VLC shown that the organization will be subject to injunctive relief issued against it during the fall 1997 general election. Rather, all the VLC can demonstrate is that in 1989 and 1993, under the VFEPA, the DPV successfully enjoined the VLC from distributing voter guides and other pamphlets in violation of the VFEPA. No evidence exists that the VLC is currently under an actual or threatened application of the new VCFDA.

In *Renne*, the Supreme Court noted that "past exposure to illegal conduct does not itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Renne*, 501 U.S. at 320-21, 111 S. Ct. at 2338. The instant

case is even stronger. Here, the VLC can not even demonstrate that the DPV engaged in illegal conduct, especially since the DPV was able to persuade Virginia state courts on three occasions to issue injunctions against the VLC for violations of the VFEPA. Moreover, all of the "harms" which the VLC alleges were suffered by it are stated in the past tense and relate to the VFEPA, a statute which is no longer in effect. The 1989 and 1993 injunctions which formed the basis for this action have been dissolved, vacated, or dismissed. No action has been taken by the DPV to enforce the new VCFDA. Thus, no actual or threatened harm exists, and the district court correctly dismissed Count One on lack of ripeness grounds. *See Woodall*, 47 F.3d at 658 (action should be deferred until a "clean-cut and concrete" controversy exists).

Finally, we turn to the VLC's attempt to transform its "as applied" challenge into a facial challenge. A review of the VLC's First Amended Complaint and the relief sought demonstrates that the present action is properly characterized as an "as applied" challenge to the now repealed VEFPA. The VLC makes no assertion, nor demand that the now repealed VEFPA is unconstitutional and should be declared such. Rather, the VLC's demand states that "when enforced . . . by injunctions that restrain speech," the VEFPA, in combination with the general statute authorizing private parties to seek injunctive relief, constitutes an unconstitutional "*199 system of prior restraints." Thus, VLC's own characterization of its claim demonstrates its attack involved only an "as applied"

challenge.[6] Accordingly, the district court should be affirmed.[7]

B. Rooker-Feldman *Doctrine*

The district court dismissed Counts Two, Three, Seven, and Eight for lack of subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine. The doctrine prohibits the United States District Courts, with the exception of habeas corpus actions, from "sit[ting] in direct review of state court decisions." *Feldman*, 460 U.S. at 483 n.16, 103 S. Ct. at 1316 n.16. The *Rooker-Feldman* doctrine only applies to "adjudications" not "legislative acts." *Feldman*, 460 U.S. at 479, 103 S. Ct. at 1313. The Court has explained that adjudications involve application of existing laws to the facts of a particular case, while

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[6] Moreover, the DPV would not be the proper party to a valid facial challenge, the Commonwealth of Virginia would. Thus, the VLC has sued the wrong party, even if VLC had alleged a facial challenge to the VEFPA.

[7] As an aside, we note that in a case related to the present one, *Virginia Society for Human Life, Inc. v. Caldwell*, 906 F. Supp. 1071 (W.D.Va.1995), the same district judge preliminarily enjoined the same challenged provisions on the grounds that "the challenged provisions arguably apply to [plaintiffs] and have a chilling effect on their freedom of speech." *Id.* at 1072. In the interest of federalism and comity, the district court submitted the issues of state statutory construction of those challenged provisions to the Virginia Supreme Court, and entered a preliminary injunction. Thus, the *Caldwell* case demonstrates that a facial challenge may be brought against the challenged provisions, and perhaps, a facial challenge may be successful. As noted above, however, unlike the plaintiffs in *Caldwell* who brought a facial challenge to the statute arguing that the challenged provisions were overbroad, the VLC has not done so in the instant case.

legislative acts "[look] to the future and [change] existing conditions by making a new rule to be applied thereafter to all or some part of those subject to [their] power[s]." *Id.* at 477, 103 S. Ct. at 1312.

The doctrine extends not only to constitutional claims presented or adjudicated by the state courts but also to claims that are "inextricably intertwined" with a state court judgment. *Feldman*, 460 U.S. at 486-87, 103 S. Ct. at 1316-17; *Leonard v. Suthard*, 927 F.2d 168, 169-70 (4th Cir.1991). Furthermore, the *Rooker-Feldman* doctrine precludes not only review of adjudications of the state's highest court, but also the decisions of its lower courts. *See Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. and N.J. Police Dep't*, 973 F.2d 169, 177 (3d Cir.1992). With these principles in mind, we now address the VLC's claim that the *Rooker-Feldman* doctrine does not pose a bar to its § 1983 claims.

In the instant case, the district court concluded that the *Rooker-Feldman* doctrine barred the court's consideration of the VLC's § 1983 claims. The district court stated that the "key issue is whether the injuries alleged by the federal plaintiffs resulted from state court judgments or whether they are independent claims." The district court concluded that:

> In this case, plaintiffs claim they were injured as a result of state court injunctions—injuries caused not by the defendants but by the actions of state courts. While the plaintiffs complain that the defendants sought the injunctions against them, the alleged injury occurred only when the state court granted the injunctions. Thus, the plaintiffs are essentially claiming injury at the hands of the state court. Under *Rooker-Feldman*, a federal district court may not entertain such a suit.

Jordahl, 947 F. Supp. at 240.

The district court then addressed the VLC's argument that because the Virginia courts eventually dissolved the injunctions, no outstanding judgments subject to attack remained, and thus, the *Rooker-Feldman* doctrine does not operate as a bar to the district court's consideration of the § 1983 claims. In ascertaining whether the *Rooker-Feldman* doctrine applied the district court stated that it must determine "whether the litigant challenges the underlying procedure as unconstitutional or instead seeks review of the state court judgment in his case." *Jordahl*, 947 F. Supp. at 240-42. Relying principally ***200** upon *Young v. Murphy*, 90 F.3d 1225 (7th Cir.1996), the district court concluded that the doctrine barred the court's consideration of the VLC's claims.

In *Young*, plaintiff brought a § 1983 action against government officials, alleging various civil rights violations arising out of a competency hearing involving John Wellman, an elderly friend of the plaintiff's. After Wellman, a wealthy client, attempted to transfer his assets to plaintiff, his attorney,[8] state officials moved to declare Wellman incompetent. An Illinois circuit court granted the motion and appointed a guardian for Wellman. Ultimately, plaintiff succeeded in reversing the circuit court's judgment and having Wellman declared competent.

After Wellman died, plaintiff, as executor of the estate, filed a federal civil rights suit on behalf of his deceased client against the public officials involved in the original competency hearing. The district court dismissed part of the suit for failure to state a claim. On appeal, the Seventh Circuit affirmed the district court's dismissal and

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[8] Wellman did not have any family or other friends.

also remanded with instructions to dismiss the remainder of the complaint on the grounds that the *Rooker-Feldman* doctrine divested the district court of subject matter jurisdiction over the complaint.

In so holding, the circuit court, cited with approval by the district court in the instant case, stated:

> [c]ases dealing with *Rooker-Feldman* generally address instances where the underlying harm alleged in the complaint has gone unrectified. In this case we are presented with a situation where [plaintiff] has already rectified the consequences of the allegedly unconstitutional state proceedings through the fully litigated restoration of Wellman to full competency in state court. Therefore [plaintiff] would suggest that this suit is neither an appeal of, nor a collateral attack upon, the earlier incompetency proceeding. But attacking the effects of that judgment is exactly what he is doing. Wellman's injury resulted from the state court judgment of incompetency and not from the alleged denial of due process. Had he prevailed in the [earlier] hearing . . . he would have had no injury and no constitutional claim to bring before the district court. Thus, [plaintiff] is really claiming Wellman's injury resulted from the state court judgment rather than the due process afforded by Illinois probate courts.

Young, 90 F.3d at 1231.

Based on the *Young* case, the district court concluded that the VLC is attacking the effects of the

initial state court judgments, and not any independent action by the DPV. Thus, the court held that since the VLC's claimed injury "stems from the state court judgment", the court lacked subject matter jurisdiction over the claims.[9] *Jordahl*, 947 F. Supp. at 241.

The VLC challenges the district court's application of the *Rooker-Feldman* doctrine. The VLC argues that the *Rooker-Feldman* doctrine is inapplicable for a number of reasons: (1) the state court's decisions were not adjudications, but rather, legislative acts; (2) the state court's injunctions have been dissolved, thus no outstanding judgments or injunctions against VLC remain in effect; and (3) the doctrine does bar collateral attacks on ex parte state court orders.

1. Legislative vs. Adjudications

Principally, the VLC argues that the "sweeping and breathtakingly overbroad injunctions in the underlying actions . . . looked to the future and changed existing conditions by forbidding VLC's future speech and the future speech of non parties. . . ." The VLC's contention must fail.

Unquestionably, the state court proceedings required the state court to engage in a ***201** judicial inquiry into the DPV's claims of the VLC's alleged violation

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[9] The district court also rejected the VLC's argument that the injunctions were "legislative acts" rather than adjudications. The district court noted that "in this case, the Virginia state courts granted the injunctions because those courts determined that the [VLC's] actions violated existing laws. An injunction under these circumstances must be considered an adjudication for purposes of *Rooker-Feldman*." *Jordahl*, 947 F. Supp. at 241 (italics in original).

of Virginia's campaign statutes. Moreover, a judicial act was necessitated to declare and enforce those rights. The injunctions were "judicial" in nature because the injunctions required the VLC's immediate compliance with existing Virginia law. As for the VLC's future argument, the injunctions only remained in effect so long as the VLC did not comply with the existing law. The state court did not change or create new law. Rather, the state court was required to decide whether existing law had been violated. Thus, the state court's proceedings were "adjudications."

The VLC cites to a few cases which indicate that the issuance of injunctions may be legislative acts. *See, e.g., Hoover v. Wagner*, 47 F.3d 845, 849 (7th Cir.1995) (noting, without deciding the issue, that "[i]njunctions often do function like statutes."); *Cheffer v. McGregor*, 6 F.3d 705, 708 (11th Cir.1993), *vacated on other grounds*, 41 F.3d 1421 (11th Cir.1994) (en banc) (finding state court injunction to be statutory in character); *Henson v. East Lincoln Twp.*, 814 F.2d 410, 416 (7th Cir.1987) (injunction that corresponds to state statute for bringing about general compliance with the law is "legislative"), *cert. dismissed*, 506 U.S. 1042, 113 S. Ct. 1035, 122 L.Ed.2d 111 (1993).

Arguably, the VLC's strongest case is *Cheffer*, but that case provides little guidance for resolution of the present case. *Cheffer* involved an injunction prohibiting "pro-life" speech activities in a certain geographic area. As the court noted, the injunction had the "unusual characteristic" of extending to non-parties and imposing criminal penalties to otherwise constitutional activity. *Cheffer*, 6 F.3d at 708. In fact, the court stated that the injunction "has all the attributes of a criminal statute." *Id.*

Cheffer does not assist the VLC for two primary reasons. First, the injunctions at issue in the instant case did not apply to non-parties as the VLC argues. While the

injunction issued by the Fairfax court enjoined the VLC and "their officers, agents, representatives, associates, or anyone acting in concert with them . . .", the injunction included only those persons who would be acting under the direction of the VLC. Second, and more importantly, the *Cheffer* analysis did not arise within the *Rooker-Feldman* context. Thus, the state court injunctions are adjudications and the *Rooker-Feldman* doctrine bars the district court's consideration of the claims.

2. Dissolution of State Court Injunctions

Secondarily, the VLC argues that "[o]nce a judgment or order has been 'reversed or modified' in the state court system, it is no longer an 'effective and conclusive adjudication', thus nothing exists for a federal court to 'reverse or modify,' and *Rooker*'s limitation on statutory jurisdiction simply does not apply." The VLC argues that the district court's reliance on *Young* is misplaced. Instead, the VLC maintains that *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L.Ed.2d 383 (1994), and *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir.1995), demonstrate that the dissolution of the state courts' injunctions allows for maintenance of the present action by the district court. Neither *Heck* or *Homola* supports the VLC's position.

In *Heck*, the Court reiterated its view that the *Rooker-Feldman* doctrine does not serve to bar a plaintiff's action that "will not demonstrate the invalidity of any outstanding criminal judgment. . . ." The Court stressed however, that the doctrine will serve as a bar if plaintiff's action requires the district court to " necessarily imply the invalidity of his conviction or sentence. . . ." *Heck*, 512 U.S. at 487, 114 S. Ct. at 2372 (emphasis added). Similarly, in *Homola*, the Seventh Circuit reiterated the tenets of the *Rooker-Feldman* doctrine. *See Homola*, 59

F.3d at 650. Neither of those cases stand for the proposition that once a state court decision has been reversed or modified, a federal district court may now pass upon the validity of that judgment, which is precisely what the district court recognized the VLC sought to do.[10]

***202** The *Rooker-Feldman* doctrine divests the district court of jurisdiction where "entertaining the federal claim should be the equivalent of an appellate review of [the state court] order." *FOCUS v. Allegheny County Ct. of Common Pleas*, 75 F.3d 834, 840 (3d Cir.1996). The controlling question in the *Rooker-Feldman* analysis is whether a party seeks the federal district court to review a state court decision and thus pass upon the merits of that state court decision, not whether the state court judgment is presently subject to reversal or modification. Put another way, if "in order to grant the federal plaintiff the relief sought, the federal court must determine that the [state] court judgment was erroneously entered or must take action that would render the judgment ineffectual," *Rooker-Feldman* is implicated. *Ernst v. Child and Youth Servs.*, 108 F.3d 486, 491 (3d Cir.1997); *see also Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir.1995) (*Rooker-Feldman* operates as a bar "if the relief requested in the federal action requires determining that the state court decision is wrong or would void the state court's ruling"). The *Rooker-Feldman* doctrine is in no way

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[10] The VLC's reliance on *United States v. Owens*, 54 F.3d 271 (6th Cir.), *cert. dismissed*, --- U.S. ----, 116 S. Ct. 492, 133 L.Ed.2d 418 (1995), is equally flawed. In that case, the court concluded that *Rooker-Feldman* did not operate as a bar against entities that were not parties in the state court action, and thus where no state court judgment exists against the entities. The VLC's reliance on the court's statement "against whom there is no state court judgment" is at best inaccurate, and at the least a distortion of the court's discussion of the doctrine in that case.

dependent upon the temporal procedural posture of the state court judgment, rather, the doctrine reinforces the important principle that review of state court decisions must be made to the state appellate courts, and eventually to the Supreme Court, not by federal district courts or courts of appeals.

In the instant case, the VLC seeks damages as a result of the state court's actions issuing the three injunctions at issue. It is axiomatic that in order for the VLC to obtain damages as a result of the state court's issuance of the injunctions at issue, the federal district court would be required to determine that the state courts' decisions were wrong. The present action by the VLC requires a review of the state courts' decisions--pure and simple.

A distinction must be made between actions seeking review of the state court decisions themselves and those cases challenging the constitutionality of the process by which the state court decisions resulted. For example, in *Feldman*, the Court recognized that the plaintiff was allowed to challenge the constitutionality of a rule under which he had been denied admission to the bar, but the Court prohibited the plaintiff from challenging in federal court, the denial itself. *Feldman*, 460 U.S. at 487-88, 103 S. Ct. at 1317-18; *see also Van Harken v. City of Chicago*, 103 F.3d 1346, 1349 (7th Cir.1997) (court held that federal plaintiffs' action merely seeking a declaration that the process under which parking charges were imposed were constitutionally inadequate, and not challenging the judgment in any parking case, was not barred by *Rooker-Feldman*.).

The VLC does not merely seek a declaration that the process by which the state court injunctions were issued was unconstitutional. *See supra* Part A. Here, the VLC seeks a federal district court to declare the Virginia state courts' decision in error, and in turn, to award the VLC damages as a result of the issuance of those injunctions. Furthermore, the VLC's attempt to narrow application of the doctrine to apply only in circumstances where a state court decision is still subject to reversal or modification is untenable. The fact that the injunctions are no longer presently in effect does not alter the analysis under *Rooker-Feldman*. The VLC still seeks federal court review of the validity of those state court judgments, a review which the federal district court is not empowered to undertake.

Moreover, the VLC may not escape the jurisdictional bar of *Rooker-Feldman* by merely refashioning its attack on the state court judgments as a § 1983 claim. *See Bechtold v. City of Rosemount*, 104 F.3d 1062, 1065 (8th Cir.1997) ("cases make it clear that a litigant cannot circumvent *Rooker-Feldman* by recasting his or her lawsuit as a § 1983 action"). As this court has stated in *Leonard v. Suthard*, 927 F.2d 168 (4th Cir.1991), where plaintiffs' claims are "inextricably intertwined" with the merits of a state court decision, then the district court is ***203** being asked to review the state court decision, a result prohibited under *Rooker-Feldman*. *Id.* at 169-70.

The VLC's § 1983 claims that the Virginia statutes constitute an unconstitutional system of prior restraint are "inextricably intertwined" with the state court decisions issuing the injunctions. Federal review of the VLC's claim would require the district court to decide the validity or invalidity of the state court's decision to issue the injunctions. Moreover, as the district court recognized relying upon *Young*, the alleged harm suffered by the VLC

is a result of the state court injunctions, not of the DPV's lawful use of the state court system. If the state courts did not issue the injunctions, the VLC would have no harm of which to complain. *See also Homola*, 59 F.3d at 650 ("A defendant who has lost in state court and sues in federal court does not assert injury at the hands of his adversary; he asserts injury at the hands of the court, and the second suit therefore is an effort to obtain collateral review."). Thus, the district court is affirmed as the VLC's claims are barred by the *Rooker-Feldman* doctrine.[11]

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[11] Although the district court did not address the VLC's argument with respect to ex parte orders and the *Rooker-Feldman* doctrine, we are unpersuaded by the VLC's argument. First, the record reflects that the state courts in 1989 and 1993 held hearings, and the VLC was given an opportunity to be heard and contest the injunctions. Indeed, in the 1993 Fairfax action, LaRock's constitutional and other objections were noted on the face of the injunction itself. Second, the VLC may challenge the state court's order in the Virginia Supreme Court, the proper avenue for such an appeal. *See Young*, 90 F.3d at 1230 ("litigants who feel a state proceeding has violated their constitutional rights must appeal that decision through their state courts and thence to the Supreme Court."). In fact, LaRock apparently recognizes the proper course as she appealed the 1993 Fairfax injunction to the Virginia Supreme Court, which summarily dissolved the state court injunction. Third, the VLC's reliance upon *Resolute Ins. Co. v. State of North Carolina*, 397 F.2d 586 (4th Cir.), *cert. denied*, 393 U.S. 978, 89 S. Ct. 446, 21 L.Ed.2d 439 (1968), is misplaced. In that case, the court noted that "a federal court may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident or mistake." Although that statement was made within the context of res judicata, and not *Rooker-Feldman*, more importantly to the case at hand, the VLC has failed to identify any fraud or deception on the part of the DPV in the procurement of the injunctions at issue.

C. *Supplemental Jurisdiction*

After dismissing the federal claims, the district court similarly dismissed the remaining state law claims. The VLC claims that the district court erred in doing so.

28 U.S.C. § 1367(a) provides that "[i]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that . . . form part of the same case or controversy. . . ." The statute goes on to provide that a district court may decline to exercise supplemental jurisdiction in certain circumstances. *See* 28 U.S.C. § 1367(c)(3) ("the district court has dismissed all claims over which it has original jurisdiction . . .").

In the instant case, the district court dismissed the federal claims over which it had original jurisdiction and then declined to exercise supplemental jurisdiction over the remaining state law claims. Although the district court did not cite to § 1367(c)(3), it is clear from its opinion, that the district court exercised its discretion not to assert supplemental jurisdiction over the state law claims.

In *Shanaghan v. Cahill*, 58 F.3d 106 (4th Cir.1995), we noted that "trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when federal claims have been extinguished." *Id.* at 110 (citing *Noble v. White*, 996 F.2d 797, 799 (5th Cir.1993)). The doctrine of supplemental jurisdiction, the court emphasized, "is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in a manner that most sensibly accommodates a range of concerns and values." *Shanaghan*, 58 F.3d at 106 (quoting *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350, 108 S. Ct. 614, 619, 98 L.Ed.2d 720 (1988)).

In the instant case, no evidence of abuse of discretion by the district court exists in its decision to decline to exercise supplemental jurisdiction over the remaining state law claims. Thus, the district court is affirmed on this basis as well.

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III.
CONCLUSION

The district court properly dismissed Count One on grounds of mootness and lack of ripeness. Counts Two, Three, Seven, and Eight were properly dismissed under the *Rooker-Feldman* doctrine. Finally, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the remaining state law claims. The judgment of the district court is accordingly

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 22, 1997

No.: 96-2402
CA-95-1043-R

VERN T. JORDAHL; MARY-BETH LAROCK; VIRGINIA LEADERSHIP

Plaintiffs - Appellants

v.

DEMOCRATIC PARTY OF VIRGINIA; RICHMOND CITY DEMOCRATIC COMMITTEE

Defendants - Appellees

COMMONWEALTH OF VIRGINIA

Intervenor - Appellee

and

MARK R. WARNER; PIXIE BELL; LAWRENCE H. FRAMME, III; CHESTER A. ROBERTS; JOHN DOES

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

Ch. 1042
S.B. No. 170
ELECTIONS--CAMPAIGN FINANCE DISCLOSURE REQUIREMENTS--IDENTIFICATION OF PERSONS RESPONSIBLE FOR CAMPAIGN WRITINGS

An Act to amend and reenact §§ 24.2-901, 24.2-908, 24.2-910 and 24.2-1014 of the Code of Virginia, relating to requirements for campaign finance disclosure and for identifying persons responsible for campaign writings; penalties.

Approved May 6, 1996

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-901, 24.2-908, 24.2-910 and 24.2-1014 of the Code of Virginia are amended and reenacted as follows:

§ 24.2-901. Definitions

A. As used in this chapter, unless the context requires a different meaning:

"Campaign committee" means the committee designated by a candidate to receive all contributions and make all expenditures for him or on his behalf in connection with his nomination or election.

"Contribution" means money and services of any amount, and any other thing of value over $100, given, advanced, promised, loaned, or in any other way provided to a candidate, campaign committee, political committee, inaugural committee, or person for the purpose of influencing the outcome of an election or defraying the costs of the inauguration of a Governor, Lieutenant Governor, or Attorney General. "Contribution" includes money, services, or things of value in any way provided by a candidate to his own campaign.

"Expenditure" means money and services of any amount, and any other thing of value over $100, paid, promised, loaned, provided, or in any other way disbursed by any candidate, campaign committee, political committee, inaugural committee, or person for the purpose of influencing the outcome of an election or defraying the costs of the inauguration of a Governor, Lieutenant Governor, or Attorney General.

"Inaugural committee" means any committee which anticipates receiving contributions or making expenditures, from other than publicly appropriated funds, for the inauguration of the Governor, Lieutenant Governor, or Attorney General and related activities.

"Independent expenditure" means an expenditure made by any person or political committee which is not made to, controlled by, coordinated with, or made upon consultation with a candidate, his campaign committee, or an agent of the candidate or his campaign committee.

"Person" means any individual or corporation, partnership, business, labor organization, membership organization, association, cooperative, or other like entity.

"Political action committee" means any organization, other than a campaign committee or political party committee, established or maintained in whole or in part to receive and expend contributions for political purposes.

"Political committee" means any state political party committee, congressional district political party committee, county or city political party committee for a county or city with a population of more than 100,000, organized political party group of elected officials, political action committee, ~~or~~ other committee, *person* or group of persons which receives contributions or makes expenditures for the purpose of influencing the outcome of any election. The term shall not include: *(i)* a campaign committee ~~or~~; *(ii)* a political party committee exempted pursuant to § 24.2-911; ***or (iii) a person who receives no contributions from any source and whose only expenditures are made solely from his own funds and are either contributions made by him which are reportable by the recipient pursuant to Article 4 (§ 24.2-914 et seq.) of this chapter or independent expenditures which are reportable by him to the extent required by subsection B of § 24.2-910, or a combination of such reportable contributions and independent expenditures***.

B. For the purpose of applying the filing and reporting requirements of Article 3 (§ 24.2-908 et seq.) and Article 4 (§ 24.2-914 et seq.) of this chapter, the terms "person," "political action committee," and "political committee" shall not include an organization holding tax-exempt status under § 501 (c) (3) of the United States Internal Revenue Code which, in providing information to voters, does not advocate or endorse the election or defeat of a particular candidate, group of candidates, or the candidates of a particular political party.

§ 24.2-908. Statement of organization

Each ~~person and~~ political committee which anticipates receiving contributions or making expenditures in excess of ~~$100~~ ***$200 in a calendar year*** shall file with the State Board a statement of organization (i) within ten days after its organization or, if later, within ten days after the date on which it has information which causes the ~~person or~~ committee to anticipate it will receive contributions or make expenditures in excess of ~~$100~~ ***$200*** or on which it otherwise becomes subject to the provisions of this chapter, and (ii) annually thereafter by January 15. ~~This requirement shall not apply to a person or committee whose only disbursement is in the form of a contribution and which itself receives no contributions from which the disbursement is made.~~

The statement of organization shall include:

1. The name and address of the ~~person or~~ committee;

2. The names, addresses, and relationships of affiliated or connected organizations;

3. The area, scope, or jurisdiction of the ~~person or~~ committee;

4. The name, residence and business addresses, and position of the custodian, if any, of books and accounts;

5. The name, residence address, and position of other principal officers, including officers and members of the finance committee, if any;

6. The name, address, office sought, and party affiliation of each individual whom the ~~person or~~ committee is supporting or opposing for nomination or for election to any public office whatever or, if supporting the entire ticket of any party, the name of the party;

7. In the event the ~~person or~~ committee is promoting or opposing a referendum, the subject of the

referendum, the date and location of the election, and a statement whether the ~~person or~~ committee is promoting or opposing the referendum question;

8. In the case of an inaugural fund committee, the name, address, and office to which elected of the person on whose behalf the committee is organized;

9. A statement whether the ~~person or~~ committee is a continuing one;

10. The disposition of residual funds which will be made in the event of dissolution;

11. A listing of all banks, safe-deposit boxes, or other repositories used; and

12. Such other information as shall be required by the State Board. Any change in information previously submitted in a statement of organization shall be reported to the State Board within ten days following the change. Any ~~person or~~ committee which, after having filed one or more statements of organization, disbands or determines it will no longer receive contributions or make expenditures during the calendar year in an aggregate amount exceeding ~~$100~~ ***$200*** shall so notify the State Board.

§ 24.2-910. Political committees and persons required to file disclosure reports

A. Any ~~person or~~ political committee required to file a statement of organization by § 24.2-908 shall be required to maintain records and file disclosure reports as provided in Article 4 ***(§ 24.2-914 et seq.) of this chapter***.

B. Any person ~~or~~ ***who is not a*** political committee ~~making~~ ***and who makes*** independent expenditures***, in the aggregate, in excess of $500 for a statewide election or $200 for any other election*** shall maintain records and report pursuant to Article 4 ***(§ 24.2-914 et seq.) of this chapter*** all ~~contributions~~

~~received and~~ *such independent* expenditures ~~made of~~ *including*:

1. Any funds~~, in the aggregate, in excess of $500 for a statewide election or $100 for any other election~~ expended for the purpose of influencing the outcome of any election ***for public office***; ***and***

2. Any funds ~~in any amount~~ expended to publish or broadcast to the public any material referring to a candidate by name, description, or other reference and (i) advocating his election or defeat, (ii) setting forth his position on any public issue, voting record, or other official acts, or (iii) otherwise designed to influence individuals to cast their votes for or against him or to withhold their votes from him~~; and~~

~~3. Any funds in any amount expended to publish or broadcast to the public any material promoting or opposing a question submitted to the voters in a referendum~~.

§ 24.2-1014. Identifying persons responsible for campaign writing; penalties

A. As used in this section "writing" includes any printed or otherwise reproduced statement or advertisement ***made for the purpose of influencing the outcome of an election for public office***, but shall not include editorial comment or news coverage which is sponsored and financed by the news medium publishing or broadcasting it nor writings authorized by the candidate on novelties including, but not limited to, pens, pencils, and buttons to be attached to wearing apparel.

B. It shall be unlawful for any person to cause any writing other than a television or radio broadcast to appear concerning any ~~**potential nominee or**~~ ***clearly identified*** candidate~~**, or concerning any question to be submitted to the voters**~~ unless such writing plainly identifies the person responsible for it. The writing shall carry the statement "authorized by" ..... and contain the following information to complete the statement:

1. The name of the candidate if the writing is authorized by the candidate or his campaign committee;

2. The name of the political party committee if the writing is authorized by that committee; or

3. If authorized by any person other than the candidate, his campaign committee, or a political party committee, either:

a. In the case of a committee that has filed a statement of organization under § 24.2-908, the full name of the committee and a registration number provided by the State Board, or

b. In any other case, the full name and residence address of the individual responsible for the writing.

C. It shall be unlawful for any person to use a false or fictitious name or address on any such writing described in subsection B.

D. It shall be unlawful for any person to cause any radio or television statement to appear ***concerning any clearly identified candidate*** unless the

advertisement or statement contains information which plainly identifies the candidate, committee, or individual responsible for it.

E. Any person violating any provision of this section shall be subject to a civil penalty not to exceed fifty dollars; and, in the case of a willful violation, he shall be guilty of a Class 1 misdemeanor. The procedure to enforce the civil penalty provided in this section shall be as stated in § 24.2-929. The violation of this section shall not void any election.

28 U.S.C. § 1367

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original

jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling

reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Virginia Code § 24.2-901 (enacted December 1, 1993, and as amended effective July 1, 1996)

§ 24.2-901 Definitions.

A. As used in this chapter, unless the context requires a different meaning:

"Campaign committee" means the committee designated by a candidate to receive all contributions and make all expenditures for him or on his behalf in connection with his nomination or election.

"Contribution" means money and services of any amount, and any other thing of value over $100, given, advanced, promised, loaned, or in any other way provided to a candidate, campaign committee, political committee, inaugural committee, or person for the purpose of influencing the outcome of an election or defraying the costs of the inauguration of a Governor, Lieutenant Governor, or Attorney General. "Contribution" includes money, services, or things of value in any way provided by a candidate to his own campaign and the payment by the candidate of any primary filing fee.

"Expenditure" means money and services of any amount, and any other thing of value over $100, paid, promised, loaned, provided, or in any other way disbursed by any candidate, campaign committee, political committee, inaugural committee, or person for the purpose of influencing the outcome of an election or defraying the costs of the inauguration of a Governor, Lieutenant Governor, or Attorney General.

"Inaugural committee" means any committee which anticipates receiving contributions or making expenditures, from other than publicly appropriated funds, for the inauguration of the Governor, Lieutenant Governor, or Attorney General and related activities.

"Independent expenditure" means an expenditure made by any person or political

committee which is not made to, controlled by, coordinated with, or made upon consultation with a candidate, his campaign committee, or an agent of the candidate or his campaign committee.

"Person" means any individual or corporation, partnership, business, labor organization, membership organization, association, cooperative, or other like entity.

"Political action committee "means any organization, other than a campaign committee or political party committee, established or maintained in whole or in part to receive and expend contributions for political purposes.

"Political committee" means any state political party committee, congressional district political party committee, county or city political party committee for a county or city with a population of more than 100,000, organized political party group of elected officials, political action committee, other committee, person or group of persons which receives contributions or makes expenditures for the purpose of influencing the outcome of any election. The term shall not include: (i) a campaign committee; (ii) a political party committee exempted pursuant to § 24.2-911; or (iii) a person who receives no contributions from any source and whose only expenditures are made solely from his own funds and are either contributions made by him which are reportable by the recipient pursuant to Article 4 (§ 24.2-914 et seq.) of

this chapter or independent expenditures which are reportable by him to the extent required by subsection B of § 24.2-910, or a combination of such reportable contributions and independent expenditures.

B. For the purpose of applying the filing and reporting requirements of Article 3 (§ 24.2-908 et seq.) and Article 4 of this chapter, the terms "person," "political action committee," and "political committee" shall not include an organization holding tax-exempt status under § 501 (c) (3) of the United States Internal Revenue Code which, in providing information to voters, does not advocate or endorse the election or defeat of a particular candidate, group of candidates, or the candidates of a particular political party.

Virginia Code § 24.2-908 (enacted December 1, 1993, and as amended effective July 1, 1996)

§ 24.2-908 Statement of organization.

Each political committee which anticipates receiving contributions or making expenditures in excess of $200 in a calendar year shall file with the State Board a statement of organization (i) within ten days after its organization or, if later, within ten days after the date on which it has information which causes the committee to anticipate it will receive contributions or make expenditures in excess of $200 or on

which it otherwise becomes subject to the provisions of this chapter, and (ii) annually thereafter by January 15.

The statement of organization shall include:

1. The name and address of the committee;
2. The names, addresses, and relationships of affiliated or connected organizations;
3. The area, scope, or jurisdiction of the committee;
4. The name, residence and business addresses, and position of the custodian, if any, of books and accounts;
5. The name, residence address, and position of other principal officers, including officers and members of the finance committee, if any;
6. The name, address, office sought, and party affiliation of each individual whom the committee is supporting or opposing for nomination or for election to any public office whatever or, if supporting the entire ticket of any party, the name of the party;
7. In the event the committee is promoting or opposing a referendum, the subject of the referendum, the date and location of the election, and a statement whether the committee is promoting or opposing the referendum question;
8. In the case of an inaugural fund committee, the name, address, and office to which elected of the person

on whose behalf the committee is organized;

9. A statement whether the committee is a continuing one;
10. The disposition of residual funds which will be made in the event of dissolution;
11. A listing of all banks, safe-deposit boxes, or other repositories used; and
12. Such other information as shall be required by the State Board.

Any change in information previously submitted in a statement of organization shall be reported to the State Board within ten days following the change.

Any committee which, after having filed one or more statements of organization, disbands or determines it will no longer receive contributions or make expenditures during the calendar year in an aggregate amount exceeding $200 shall so notify the State Board.

Virginia Code § 24.2-910 (enacted December 1, 1993, and as amended effective July 1, 1996)

§ 24.2-910 Persons and political committees required to file disclosure reports.

A. Any political committee required to file a statement of organization by § 24.2-908 shall be required to maintain records and file

disclosure reports as provided in Article 4 (§ 24.2-914 et seq.) of this chapter.

B. Any person who is not a political committee and who makes independent expenditures, in the aggregate, in excess of $500 for a statewide election or $200 for any other election shall maintain records and report pursuant to Article 4 of this chapter all such independent expenditures including:

1. Any funds expended for the purpose of influencing the outcome of any election for public office; and
2. Any funds expended to publish or broadcast to the public any material referring to a candidate by name, description, or other reference and (i) advocating his election or defeat, (ii) setting forth his position on any public issue, voting record, or other official acts, or (iii) otherwise designed to influence individuals to cast their votes for or against him or to withhold their votes from him.

Virginia Code § 24.2-1014 (enacted December 1, 1993, and as amended effective July 1, 1996)

§ 24.2-1014. Identifying persons responsible for campaign writings; penalties.

A. As used in this section "writing" includes any printed or otherwise reproduced statement or advertisement made for the purpose of influencing the outcome of an election for public office, but shall not include editorial comment or news coverage which is sponsored and financed by the news medium publishing or broadcasting it nor writings authorized by the candidate on novelties including, but not limited to, pens, pencils, and buttons to be attached to wearing apparel.

B. It shall be unlawful for any person to cause any writing other than a television or radio broadcast to appear concerning any clearly identified candidate unless such writing plainly identifies the person responsible for it. The writing shall carry the statement "authorized by. . . ." and contain the following information to complete the statement:

1. The name of the candidate if the writing is authorized by the candidate or his campaign committee;
2. The name of the political party committee if the writing is authorized by that committee; or
3. If authorized by any person other than the candidate, his campaign committee, or a political party committee, either:

a. In the case of a committee that has filed a statement of organization under § 24.2-908, the full name of the committee and a registration number provided by the State Board, or

b. In any other case, the full name and residence address of the individual responsible for the writing.

Virginia Code § 24.1-254.1 (repealed December 1, 1993)

§ 24.1-254.1 Statement of organization

(a) The term "committee" as used herein shall include each person, association, organization, group of individuals, any state political party, political action committee, or other committee which anticipates receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding $100, but shall not include a candidate's campaign committee or a district, county, or city political party committee or an organized political party group of elected officials. Each committee shall file with the State Board of Elections a statement of organization (i) within ten days after its organization or, if later, ten days after the date on

which it has information which causes the committee to anticipate it will receive contributions or make expenditures in excess of $100 or on which it otherwise becomes subject to the provisions of this section; and (ii) annually thereafter by January 15.

(b) The statement of organization shall include:

(1) The name and address of the committee;

(2) The names, addresses, and relationships of affiliated or connected organizations;

(3) The area, scope, or jurisdiction of the committee;

(4) The name, residence and business addresses, and position of the custodian of books and accounts;

(5) The name, residence address, and position of other principal officers, including officers and members of the finance committee, if any;

(6) The name, address, office sought, and party affiliation of (i) each candidate whom the committee is supporting or opposing, and (ii) any other individual, if any, whom the committee is supporting or opposing for nomination for election, or election, to any public office whatever; or, if the committee is supporting

the entire ticket of any party, the name of the party;

(7) A statement whether the committee is a continuing one;

(8) The disposition of residual funds which will be made in the event of dissolution;

(9) A listing of all banks, safety-deposit boxes, or other repositories used; and

(10) [Repealed.]

(11) Such other information as shall be required by the State Board of Elections.

(c) Any change in information previously submitted in a statement of organization shall be reported to the secretary of the State Board of Elections within a ten-day period following the change.

(d) Any committee which, after having filed one or more statements of organization, disbands or determines it will no longer receive contributions or make expenditures during the calendar year in an aggregate amount exceeding $100 shall so notify the secretary of the State Board of Elections.

Virginia Code § 24.1-255(C) (repealed December 1, 1993)

§ 24.1-255. Money, etc., paid or reported to treasurer; duties of committees; report of persons receiving or disbursing moneys, etc.

C. Any committee, as defined in § 24.1-254.1, (i) which expends any funds in excess of $500 for a statewide election or $100 for any one other election for the purpose of influencing the outcome of any election, or (ii) which publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate, or for the purpose of promoting or opposing a referendum, proposition, constitutional amendment, or other question submitted to the voters, shall maintain records and report all such receipts and disbursements of moneys, services, or other things of value over $100 pursuant to this chapter.

Virginia Code § 24.1-277 (repealed December 1, 1993)

§ 24.1-277 Writings concerning candidates for office to identify person responsible therefor; penalties.

A. As used in this section "writing" includes any written, printed or otherwise reproduced statement or advertisement of any class or description, but shall not include editorial comment or news coverage which is sponsored and financed by the news medium publishing or broadcasting it nor writings authorized by the candidate on novelties including, but not limited to, pens, pencils and buttons to be attached to wearing apparel.

B. It shall be unlawful for any person to cause any writing other than a television or radio broadcast to appear concerning any potential nominee or candidate, any candidate for nomination or any candidate for any office elective by the qualified voters or concerning any question or referendum to be submitted to the electors unless such writing plainly identifies the person responsible therefor and carries the statement "authorized by. . . ." and, as a minimum, information to complete the statement as follows:

1. The name of the candidate if the writing is authorized by the candidate or his campaign committee;
2. The name of the political party committee if the writing is authorized by that committee; or

3. If authorized by any person other than the candidate, his campaign committee, or a political party committee, either:

   a. in the case of a committee that has filed a statement of organization under § 24.1-254.1, the full name of the committee and a registration number provided by the State Board of Elections, or

   b. in any other case, the full name and residence address of the individual responsible for the writing.

It shall be unlawful for any person to cause any radio or television statement to appear unless the advertisement or statement contains information which plainly identifies the candidate, committee, or individual responsible therefor.

C. It shall be unlawful for any person to use a false or fictitious name or address on any such writing described in the preceding subsection.

D. Any person violating any provision of this section shall be subject to a civil penalty not to exceed fifty dollars; and, in the case of a willful violation, he shall be guilty of a Class 1 misdemeanor. The procedure to enforce the civil penalty provided herein shall be as stated in § 24.1-262. Violation of this section

shall not, however, require or result in the voiding of any election.

Supreme Court, U.S.
FILED
DEC 19 1997
CLERK

No. 97-859

In The

Supreme Court of the United States

October Term, 1997

VERN T. JORDAHL, MARY-BETH LAROCK, and VIRGINIA LEADERSHIP COUNCIL,

Petitioners,

v.

DEMOCRATIC PARTY OF VIRGINIA, RICHMOND CITY DEMOCRATIC COMMITTEE, and COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER PETITIONERS' FIRST AMENDMENT CHALLENGE TO VA. CODE §§ 24.2-908, 24.2-910, 24.2-1014, AND 8.01-620 IS EITHER MOOT OR IS NOT YET RIPE WHEN SUCH CHALLENGE IS BASED UPON PRIOR VERSIONS OF THE STATUTES AND WHEN THE STATUTES, IN THEIR PRESENT FORMS, HAVE NEVER BEEN APPLIED AGAINST THE PETITIONERS AND ARE NOT LIKELY TO BE APPLIED AGAINST THEM IN THE FUTURE?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were:

1. Vern T. Jordahl, Mary-Beth LaRock, and the Virginia Leadership Council, Plaintiffs, Petitioners herein.
2. Democratic Party of Virginia and Richmond City Democratic Committee, Defendants, Respondents herein.
3. Commonwealth of Virginia, Intervener, Respondent herein.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 2
REASONS FOR DENYING WRIT 3
CONCLUSION 9
APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Buckley v. Valeo, 424 U.S. 1 (1976) 7

Hartford-Empire Co. v. United States, 323 U.S. 386 (1945) 7

Los Angeles v. Lyons, 461 U.S. 95 (1983) 7

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 8

Mills v. Green, 159 U.S. 651 (1895) 5

Public Affairs Press v. Rickover, 369 U.S. 111 (1962) 7

Renne v. Geary, 501 U.S. 312 (1991) 7, 8

Richardson v. Ramirez, 418 U.S. 24 (1974) 4

United States Department of Justice v. Provenzano, 469 U.S. 14 (1984) 4

VSHL v. Caldwell, 906 F. Supp. 1071 (W.D. Va. 1995) 6, 7

VSHL v. Caldwell (Civ. A. No. 95-1042-R, U.S.D.C., W.D. Va., Final Order entered February 19, 1997) 4

U.S. CONSTITUTION

U.S. CONST. amend. I 5

VIRGINIA STATUTES

§ 8.01-620 ..... 1, 2, 3, 4, 8

§ 24.2-908 ..... 1, 2, 4, 7

§ 24.2-910 ..... 1, 2, 4, 7

§ 24.2-1014 ..... 1, 2, 4, 7

STATEMENT OF THE CASE

The Petitioners seek a Writ of *Certiorari* from his Court granting appellate review of a decision of the United States Court of Appeals for the Fourth Circuit ("the Fourth Circuit"). The Fourth Circuit's decision affirmed an order of the United States District Court for the Western District ("the Western District") which dismissed the Petitioners' Amended Complaint.

In Count One of their Amended Complaint, the Petitioners alleged that Va. Code §§ 24.2-908, 24.2-910, 24.2-1014 and 8.01-620, when applied together in a particular manner, create an unconstitutional system of prior restraints.[1] Sections 24.2-908, 24.2-910 and 24.2-1014, are provisions within Virginia's Campaign Finance Disclosure Act ("the Act"), all of which were amended substantially in 1996. Section 8.01-620 is Virginia's basic injunction statute. Simply stated, this provision gives general authority to Virginia's Circuit Courts to award injunctions.

Interestingly, the Petitioners in this case have not directly attacked the facial constitutionality of the Act. Instead, the Petitioners sought a judgment from the Western District declaring Virginia's statutory "scheme" unconstitutional and enjoining the Democratic Party of Virginia and the Richmond City Democratic Committee [hereinafter referred to as "DPV"] from enforcing these provisions against them in the future. In support of this

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[1] Count One of the Petitioners' Amended Complaint is reprinted as part of the Appendix to this Brief in Opposition ("App.") at App. at 1.

aspect of their claim, the Petitioners alleged that in 1989 and in 1993, DPV sought and obtained injunctions against them based upon *prior* versions of the Act and pursuant to Va. Code § 8.01-620.

Upon being advised that the Petitioners' lawsuit appeared to call into question the constitutionality of Virginia statutes, the Commonwealth of Virginia ("Commonwealth") filed a Motion to Intervene in the Western District. The Western District granted this motion. Three days after granting the Commonwealth's Motion to Intervene, the Western District granted DPV's Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Petitioners appealed the Western District's decision to the Fourth Circuit and the Fourth Circuit affirmed the Western District's dismissal of the Petitioners' Amended Complaint.

Throughout the proceedings below, the Commonwealth's participation in this case has been limited to the Petitioners' challenge to the constitutionality of the "scheme" set forth in Va. Code §§ 24.2-908, 24.2-910, 24.2-1014 and 8.01-620. Likewise, this Brief in Opposition will address only the Petitioners' constitutional challenge to these provisions and not the other aspects of the Petitioners' Amended Complaint against DPV.

SUMMARY OF ARGUMENT

Contrary to the assertions made within the Petitioners' Petition for Writ of *Certiorari*, the Western District's dismissal of Count One of the Petitioner's Amended Complaint and the Fourth Circuit's decision to

affirm the Western District's dismissal do not conflict with prior decisions of this Court or with the decisions of other circuits. Instead, when affirming the Western District's dismissal of Count One, the Fourth Circuit applied well-recognized and, with respect, relatively basic principles of law regarding mootness and a lack of justiciable case and controversy. By applying these basic principles, the Fourth Circuit correctly concluded that the Petitioners failed to present an actual case and controversy within Count One of their Amended Complaint. Accordingly, the Fourth Circuit did not err when it dismissed this portion of the Petitioners' claim. Perhaps even more importanly, this Court should decline to award a Writ of *Certiorari* associated with the Fourth Circuit's ruling since it is clear that the Petitioners' claim is purely speculative.

REASONS FOR DENYING WRIT

Introduction

The Fourth Circuit correctly recognized that the Petitioners did not present a justiciable case and controversy within Count One of their Amended Complaint. In Count One, the Petitioners did not mount a direct challenge to the facial constitutionality of the Act as it currently exists. Petitioners' Appendix ("PetApp.") at 22-23. Instead, the Petitioners alleged that the Act, *if* and when *applied* pursuant to Va. Code § 8.01-620, is unconstitutional. App. at 1-2. Under the circumstances, the Western District and the Fourth Circuit properly concluded that, under the Petitioners' own characterization of their claim, they asserted only an as applied challenge to the Act, as

opposed to a valid facial challenge.[2] The Fourth Circuit also properly concluded that such a challenge is not justicible and inappropriate for judicial consideration because it is based upon the manner in which earlier versions of the Act were applied against the Petitioners and since the possibility of any future application against the Petitioners is purely speculative.

I. The Petitioners' Claim Is Moot.

As noted above, the Petitioners' challenge to Va. Code §§ 24.2-908, 24.2-910, 24.2-1014, and 8.01-620 is based upon the manner in which prior versions of these statutes were applied against them in 1989 and 1993. It is clear, therefore, that the claim which the Petitioners attempted to state within Count One of their Amended Complaint has become moot to the extent that it is based upon the versions of these statutes which were in existence in 1989 and 1993.

Under the circumstances, this Court should refuse to grant a Writ of *Certiorari* to the Petitioners because of the mootness of their claim. *United States Department of Justice v. Provenzano*, 469 U.S. 14 (1984). *See also Richardson v.*

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[2] This factor distinguishes the Petitioners' constitutional challenge from that of the plaintiffs in *VSHL v. Caldwell* (Civ. A. No. 95-1042-R, U.S.D.C., W.D. Va., Final Order entered February 19, 1997), a case referred to by the Petitioners in their Petition for Writ of *Certiorari*. In the *Caldwell* case, the plaintiffs challenged the facial constitutionality of the current version of the Act. App. at 4-13. The Western District ultimately concluded that the current version of the Act *does not* violate the constitution of the United States and dismissed the plaintiffs' claim.

Ramirez, 418 U.S. 24, 36 (1974) (recognizing that "purely practical considerations have never been thought to be controlling by themselves on the issue of mootness in [the U.S. Supreme Court]. While the Supreme Court of [a state] may choose to adjudicate a controversy simply because of public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties."); *Mills v. Green*, 159 U.S. 651, 653 (1895) (the refusal of the Court to consider matters which have become moot arises from the common law concept that the function of the judiciary is to resolve actual controversies).

II. The Petitioners' Challenge Is Not Ripe.

The Fourth Circuit did not err when it reasoned that the Petitioners cannot support their First Amendment challenge to the Act and Virginia's general injunction statute by relying upon the manner in which statutes have been applied against them in the past since the challenged portions of the Act have been subsequently amended and re-enacted by Virginia's General Assembly and since, perhaps more importantly, the current version of the Act has *never* been applied against the Petitioners in the manner described within their Amended Complaint. There is simply nothing in the record of this case to support the Petitioners' contention that the statutes are likely to be enforced against them by DPV in the future. Furthermore, contrary to the Petitioners' contentions, the fact that DPV obtained three injunctions against the Petitioners more than four years ago in Virginia Circuit Courts, before the Act was amended in 1996, does not

establish an unconstitutional pattern of enforcement against the Petitioners which is likely to continue at this time.[3]

Moreover, again contrary to the Petitioners' contentions, there is *nothing* within in the Fourth Circuit's decision regarding justiciability which indicates that the Fourth Circuit viewed the post-application amendments to the Act as immaterial. *See Petition for Writ of Certiorari* at 15. In actuality, a review of the prior versions of the Act as compared to the current version of the statute reflects that numerous *substantive* changes to the Act have been made since 1989 and 1993 (Pet.App. at 58-81) and supports the logical conclusion that the Fourth Circuit found the amendments to be material.[4]

The Petitioners' reliance upon a *preliminary* ruling of the Western District in the case of *VSHL v. Caldwell*, 906 F. Supp. 1071 (W.D.Va. 1995), reprinted at PetApp. 1 [hereinafter referred to as "the 1995 Opinion"], as support for their contention that the Act has not been substantively amended since 1993, is also misplaced. The Petitioners fail to mention that the 1995 Opinion merely constituted an attempt of the Western District to protect the rights of

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[3] This is particularly true since, as admitted by the Petitioners, when the decision to award one of the injunctions was appealed to the Supreme Court of Virginia, Virginia's highest court chose to vacate the injunction. *Petition for Writ of Certiorari* at 6, n.3.

[4] The Fourth Circuit also recognized that Virginia's General Assembly had amended the challenged provisions "to narrow their reach." PetApp. at 23, n.11. This statement within its decision reflects that the Fourth Circuit found the amendments to be "material."

the plaintiffs in *VSHL* pending a *final* decision regarding the facial meaning and constitutionality of the Act. App. at 6. The 1995 Opinion *did not* constitute a final decision of the Western District with respect to the meaning of the challenged provisions or the effect of any amendment thereto.

Regardless, the Western District ultimately found the *1996 version* of the Act, and in particular, Va. Code §§ 24.2-908, 24.2-910, 24.2-1014, to be constitutional. App. at 5. By way of summary, the Western District concluded that these provisions can and should be construed in a constitutional manner, particularly in light of the recent amendments to the Act reflecting an attempt on the part of the Virginia General Assembly to comply with the directives of this Court as set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976). App. at 7.

The Petitioners' claim also presumes that in the future Virginia's courts *may* apply the new statutes against them in an *ex parte* manner so as to constitute an unconstitutional prior restraint. This challenge is purely speculative and does support this Court's appellate review of the Fourth Circuit's decision. As noted by this Court in *Renne v. Geary*, 501 U.S. 312, 321 (1991), and as recognized by the Fourth Circuit in this case, "[p]ast exposure to illegal conduct does not itself show a present case or controversy. . . . " *See also Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983); *Public Affairs Press v. Rickover*, 369 U.S. 111, 112 (1962) ("We have cautioned against declaratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations"); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 410

(1945) ("a decree cannot be entered enjoining all possible breaches of the law").

Stated somewhat differently, the mere fact that Virginia's injunction statute grants broad enough discretion to Virginia's Circuit Courts so as to allow for the *possibility* that a judge will apply his injunctive authority in an unconstitutional manner does not mean that Va. Code § 8.01-620, when read together with the challenged portions of the Act, is facially unconstitutional. Nor does such a purely speculative claim warrant appellate review by this Court. *Renne v. Geary*, 501 U.S. at 321. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1992) (to establish standing, a plaintiff must show a realistic danger of sustaining injury in fact, as opposed to a merely conjectural or hypothetical injury).

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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APPENDIX

* * *

COUNT I

Section 1983 Claim by Jordahl, LaRock and VLC Against DPV, Warner, Bell, Framme, Roberts, and RCDC for Declaratory and Injunctive Relief

62. Paragraphs 1-61 above are incorporated by reference as if set forth here at length.

63. Va. Code §§ 24.2-908, 24.2-910, 24.2-1014 are the recodified versions of Virginia election laws enforced against Jordahl, LaRock, VLC and others by the DPV, Warner, Bell, Framme, Roberts and RCDC under color of law with injunctions in the 1989 Richmond Action, 1989 Fairfax Action, and the 1993 Fairfax Action.

64. Va. Code §§ 24.2-908 and 24.2-910, in combination, require that "persons" and "political committees" that expend in excess of $500 in statewide elections of $100 in other elections "for the purpose of influencing the outcome" of such elections or for the purpose of publishing or broadcasting to the public "any material referring to a candidate by name, description, or other reference and (i) advocating his election or defeat; (ii) setting forth his position on any public issue, voting record, or other official acts, or (iii) otherwise designed to influence individuals to cast their votes for or against him or to withhold their votes from him" must file certain statements of organization and disclosure reports with the State Board of Elections.

65. Va. Code § 24.2-1014(B) provides that it is unlawful for any person to cause to appear "any writing

. . . concerning any potential nominee or candidate . . . unless such writing plainly identifies the person responsible for it." Section 24.2-1014(B)(3)(a) further requires that such writings published by "committees" that have filed statements of organization under § 24.2-908 shall contain the full name of the committee and a registration number provided by the State Board of Elections. Section 24.2-1014(B)(3)(b) further requires that writings published by all other persons not a candidate, campaign committee, or political party committee contain the "full name and residence address of the individual responsible for the writing."

66. Va. Code § 8.01-620 provides that Virginia circuit courts shall have jurisdiction to award injunctions, and was the basis for the injunctive relief obtained by the DPV and others in the 1989 Richmond Action, the 1989 Fairfax Action, and the 1993 Fairfax Action for alleged violations of the predecessor statutes to Va. Code §§ 24.2-908, 24.2-910, and 24.2-1014(B)(3).

67. Enforcement of Va. Code §§ 24.2-908, 24.2-910, 24.2-1014(B)(3) by injunctions pursuant to Va. Code § 8.01-620 that prohibit the distribution of written materials by persons and committees allegedly subject to §§ 24.2-908, 24.2-910, and 24.2-1014(B)(3) until such persons and committees comply with such laws constitutes a system of prior restraints of protected political speech in violation of the First Amendment to the U.S. Constitution.

WHEREFORE, Plaintiffs Jordahl, LaRock, and VLC respectfully request the Court:

(a) Declare, pursuant to Fed. R. Civ. P. 57, 42 U.S.C. § 1983, and 28 U.S.C. § 2201, that Va. Code §§ 24.2-908, 24.2-910, and 24.2-1014(B)(3), when enforced pursuant to Va. Code § 8.01-620 by injunctions that restrain speech, constitute in combination a system of prior restraints of protected political speech in violation of the First Amendment;

(b) Permanently enjoin, pursuant to Fed. R. Civ. P. 65, 42 U.S.C. § 1983, and 28 U.S.C. 2202, DPV, Warner. Bell, Framme, Roberts, and RCDC from instituting, seeking, or procuring injunctions under color of Va. Code § 8.01-620 that restrain speech of persons and committees allegedly in violation of Va. Code §§ 24.2-908, 24.2-910, and 24.2-1014(B)(3).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

VIRGINIA SOCIETY FOR HUMAN LIFE, INC., et al.,	)	Civil Action No. 95-1042-R
Plaintiffs,	)	**FINAL ORDER**
v.	)	(Filed Feb. 19, 1997)
DONALD S. CALDWELL, et al.,	)	
Defendants.	)	

In accordance with the Memorandum Opinion entered on this day, it is hereby **ORDERED** and **ADJUDGED** that plaintiffs' request for declaratory and injunctive relief be and hereby is denied and that this matter be stricken from the docket of the court.

ENTERED this 19th day of February, 1997.

/s/ Samuel G. Wilson
UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR.,
CLERK
BY: /s/ E. Holland
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

VIRGINIA SOCIETY FOR HUMAN LIFE, INC., et al.,	)	Civil Action No. 95-1042-R
Plaintiffs,	)	
v.	)	**MEMORANDUM OPINION**
DONALD S. CALDWELL, et al.,	)	**By Samuel G. Wilson United States District Judge**
Defendants.	)	(Filed Feb. 19, 1997)

Plaintiffs, Virginia Society for Human Life, Inc. ("VSHL") and Andrea Sexton, bring this action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 for infringement of their First and Fourteenth Amendment rights to freedom of speech. Plaintiffs maintain that various provisions of Virginia's Campaign Finance Disclosure Act, Va. Code Ann. §§ 24.2-901 to 24.2-1014 (Michie 1996), are overly broad and chill their free speech. They seek a declaratory judgment that Va. Code §§ 24.2-908, 24.2-910 and 24.2-1014 are unconstitutional both on their face and as applied and a permanent injunction against enforcement of the statute. Defendants contend that the challenged provisions do not apply to VSHL and Sexton and that the relief sought should be denied. The court concludes that the challenged provisions do not apply to persons and organizations, such as plaintiffs, that do not engage in express candidate advocacy and that plaintiffs lack standing to challenge the provisions further.

I

VSHL is a nonprofit, nonstock, public interest, tax-exempt corporation that purportedly engages in "issue advocacy" in Virginia through the preparation and distribution of voter guides comparing the positions of the major parties' candidates. Sexton is a Virginia resident who distributes these guides in Virginia at her own expense. Defendants are the Virginia Commonwealth's Attorneys and the members of the State Board of Elections who enforce Virginia's election laws. Plaintiffs originally brought suit in October 1995. They wanted to distribute voter guides in connection with the 1995 state general elections but feared civil and criminal penalties because, in previous election years, Virginia's circuit courts had applied Virginia's election laws to prohibit the distribution of similar voter guides. *See Jordahl v. The Democratic Party of Va.*, 947 F. Supp. 236 (W.D. Va. 1996).

On October 21, 1995, this court issued a preliminary injunction prohibiting any enforcement of certain portions of Va. Code § 24.2-1014 and prohibiting enforcement of §§ 24.2-908 and 24.2-910 against plaintiffs, except as to contributions and expenditures for express candidate advocacy. *See Va. Society for Human Life v. Caldwell*, 906 F. Supp. 1017 (W.D. Va. 1995). The court found that those provisions arguably applied to plaintiffs and were potentially overbroad and that the balance of the harms favored plaintiffs, justifying a preliminary injunction pending final judgment on the merits. Believing that issues of state statutory construction are most appropriately determined by state courts, the court certified controlling questions of statutory interpretation to the Virginia Supreme Court. The Virginia Supreme Court,

however, rejected the certified questions on January 18, 1996.

The Virginia General Assembly amended the challenged provisions in May 1996. *See* Act of May 6, 1996, ch. 1042. Plaintiffs claim that the amended statutes are "identical in all legally relevant respects" to the previous provisions. Pls.' Br. Supp. Mot. Summ. J. (Second), at 4. They filed an Amended Verified Complaint challenging the amended statutes on the same grounds as the original complaint and requesting similar declaratory and injunctive relief.

II

Because the challenged statutes arguably apply to plaintiffs' activities and potentially chill their First and Fourteenth Amendment freedoms they have standing to bring this § 1983 suit. However, the court concludes that the challenged provisions apply only to persons and organizations that engage in express candidate advocacy as it has been defined by the United States Supreme Court. *See Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976). According to plaintiffs' own description, VSHL does not engage in any express candidate advocacy;[1] That is, VSHL's voter guides do not "expressly advocate the election or defeat" of candidates, and VSHL neither receives contributions or makes expenditures for express advocacy. *Id.* at 80. Because the plaintiffs do not engage in

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[1] Indeed, defendants agree that plaintiffs engage only in issue advocacy and argue, therefore, that the statute in question does not apply to them.

express advocacy, the challenged provisions do not apply to them and they lack standing to challenge the provisions further.[2]

A. Va. Code Ann. § 24.2-908

Section 24.2-908 requires "each political committee" which anticipates receiving "contributions" or making "expenditures" in excess of $200.00 in a calendar year to file a "statement of organization" with the State Board of Elections. "Political committee" is defined, in effect, to include organizations, persons, or groups of persons which receive contributions or make expenditures *"for the purpose of influencing the outcome of an election."* Va. Code

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[2] The question of standing essentially turns on whether plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *See Baker v. Carr*, 369 U.S. 186, 204 (1962). Plaintiffs have alleged that the challenged provisions chill their exercise of their free speech rights. This chilling effect gives plaintiffs a sufficient stake to challenge the application of the statute to them. When, however, the court finds that the statute does not apply to plaintiffs, plaintiffs no longer suffer a threat of harm, and they lack sufficient personal stake in the outcome of the controversy to challenge the provisions further. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-34 (1990) (holding that plaintiffs lacked standing because they failed to show they were subject to challenged provisions); *Laird v. Tatum*, 408 U.S. 1, 11-14 (1972) (holding that chilling effect cannot substitute for standing requirement of actual or threatened injury). It would be improvident for the court to decide constitutional questions intertwined with the political process when those questions are not necessary to the resolution of plaintiffs' claims.

§ 24.2-901(A) (emphasis added). As discussed below, the phrase "for the purpose of influencing" is a term of art whose well-established meaning excludes issue advocacy. *See Buckley*, 424 U.S. at 79-80.[3] Section 24.2-908, therefore, does not apply to plaintiffs' activities.

In *Buckley*, the United States Supreme Court narrowly construed the language "for the purpose of influencing" contained in the Federal Election Campaign Act, by tying that language to a major purpose of the Act's disclosure provision – "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. The Court thereby avoided the Act's application to "groups engaged purely in issue discussion." *Id.* at 79. By avoiding the Act's application to groups engaged purely in issue advocacy, the Court saved the Act from potential unconstitutional overbreadth.

Plaintiffs now suggest that this court reject *Buckley's* interpretation of the phrase and choose instead an interpretation that would render the Virginia statute unconstitutional. Following plaintiffs' suggestion, however,

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[3] *See also Federal Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 249 (1986); *Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (Reading the term "expressly advocating" more broadly "would, by statutory interpretation, nullify" the holding of *Buckley*.); *Federal Election Comm'n v. Christian Action Network*, 894 F. Supp. 946, 951-958 (W.D. Va. 1995) (surveying cases adopting "a strict interpretation of [*Buckley's*] 'express advocacy' standard"; broader construction "would open the very Pandora's Box which the Supreme Court consciously sought to keep closed").

would violate two fundamental principles of statutory construction. First, it is well-established that "when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that a construction which will save the statute from constitutional infirmity." *United States ex rel. Attorney General of the United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909); *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). Second, a term of art generally must be given its customary meaning. When the General Assembly enacted and later amended § 24.2-908, it presumably was aware of *Buckley*'s construction of the phrase "for the purpose of influencing" to include only express candidate advocacy. The General Assembly intended, therefore, for the phrase to have that customary, narrow meaning. It follows that not only is § 24.2-908 reasonably susceptible to that narrow construction but, in light of *Buckley*, that narrow construction is the statute's best construction. VSHL is, accordingly, not a "political committee" subject to § 24.2-908 and has no standing to challenge that section further.

B. Va. Code Ann. § 24.2-910

Under § 24.2-910(A), a political committee required to file a statement of organization under § 24.2-908 is also required to maintain records and file disclosure reports. Since VSHL is not a political committee and is not

required to file a statement of organization under § 24.2-908, § 24.2-910(A) does not require it to maintain records and file disclosure reports.

Under § 24.2-910(B), a person who makes "independent expenditures" in excess of $500.00 for a state-wide election or $200.00 for any other election is required to maintain records and file disclosure reports of those "independent expenditures." An "independent expenditure" is an "expenditure" not made to, controlled by, coordinated with, or made upon consultation with a candidate. Va. Code § 24.2-901. "Expenditure" in turn, is defined, to include money, services, or anything of value given "for the purpose of influencing the outcome of an election." Va. Code § 24.2-901. In using this definition, the General Assembly limited the application of § 24.2-910 to expenditures for express candidate advocacy.[5] Since, by their own account, plaintiffs do not engage in express candidate advocacy, § 24.2-910(B) does not require them to maintain records or file disclosure reports, and they lack standing to challenge § 24.2-910 further.

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[5] [The Western District appears to have inadvertently omitted footnote 4.] VSHL contends that § 24.2-910(B) is not limited to expenditures for express candidate advocacy and improperly requires it to file disclosure reports. The court would agree were it not for the fact that the language of § 24.2-910 is limited to "independent expenditures." Funds expended for the purposes detailed in § 24.2-910(B)(2) are reportable only if they also qualify as "independent expenditures."

C. Va. Code Ann. § 24.2-1014

Va. Code § 24.2-1014(B) makes it "unlawful for any person to cause any writing . . . to appear concerning any clearly identified candidate unless such writing plainly identified the person responsible for it." A "writing" is defined in § 24.2-1014(A) as "any printed or otherwise reproduced statement or advertisement made for the purpose of influencing the outcome of an election. . . . " As with §§ 24.2-908 and 24.2-910, plaintiffs' broad construction of the phrase "for the purpose of influencing the outcome of an election" would subject their voter guides to the identification requirement. The court again rejects their construction and instead interprets the phrase "for the purpose of influencing the outcome of an election" as a term of art that includes only express candidate advocacy. Since plaintiffs do not engage in express candidate advocacy, § 24.2-1014(B) does not apply to them and they lack standing to challenge the statute further.

III

For the reasons stated, the court concludes that the challenged provisions of Va. Code §§ 24.2-908, 24.2-910 and 24.2-1014 are limited to express candidate advocacy. Because plaintiffs engage only in issue advocacy, the statute does not apply to them and the court will dismiss their challenges for lack of standing.

An appropriate order will issue.

ENTER this 19th day of February, 1997.

/s/ Samuel G. Wilson

UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:
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BY: /s/ E. Holland
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Supreme Court, U.S.
FILED
DEC 23 1997
CLERK

No. 97-859

In The Supreme Court of the United States

OCTOBER TERM 1997

VERN T. JORDAHL, MARY-BETH LAROCK, and VIRGINIA LEADERSHIP COUNCIL,

Petitioners,

v.

DEMOCRATIC PARTY OF VIRGINIA, RICHMOND CITY DEMOCRATIC COMMITTEE, and COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PARTIES TO THE PROCEEDING

Petitioners are Vern T. Jordahl, Mary-Beth LaRock and Virginia Leadership Council. Respondents are the Democratic Party of Virginia, the Richmond City Democratic Committee and the Commonwealth of Virginia.

TABLE OF CONTENTS

Parties to the Proceeding i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Reasons For Denying The Writ 2

1. The Petition misrepresents the Court of Appeals' finding regarding the justiciability of the claims in Count I 3

2. The Petition misrepresents the Court of Appeals' finding that there is no jurisdiction under the Rooker-Feldman doctrine . . . 6

Conclusion 11

TABLE OF AUTHORITIES

Cases cited:

Arizonans for Official English v. Arizona, ___ U.S. ___, 117 S. Ct. 1055 (1997) 3

Brown v. Carolina, C & O Ry., 116 Va. 597, 83 S.E. 981 (1914) 8

Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993), vacated on other grounds, 41 F.3d 1421 (11th Cir. 1994) 10

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 7, 8, 10

Heck v. Humphrey, 512 U.S. 477 (1994) 8, 9

Henson v. East Lincoln Township, 814 F.2d 410, 416 (7th Cir. 1987), cert. dismissed, 506 U.S. 1042 (1993) 11

Hoover v. Wagner, 47 F.3d 845 (7th Cir. 1995) 10, 11

Jordahl v. Democratic Party of Virginia, 122 F.3d 192 (4th Cir. 1997) 1

McIntyre v. Ohio Elections, 514 U.S. 334 (1995) 4

Northeastern Florida Chapter of Ass'n Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993) 4

Renne v. Geary, 501 U.S. 312 (1991) 5, 6

Rembert v. Sheahan, 62 F.3d 937 (7th Cir. 1995) 5

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 9

The Omega Corp. v. Cobb, 222 Va. 875, 292 S.E.2d 44 (1981) 7

Statutes cited:

Virginia Code Ann. § 8.01-626 (Michie 1992) 7

Virginia Code Ann. § 24.1-254.1 (repealed) 4

Virginia Code Ann. § 24.2-901 (Michie 1997) 4

Virginia Code Ann. § 24.2-1014(B) (Michie 1997) 4

Rules cited:

Sup. Ct. R. 15.2 1

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case involves established issues relating to justiciability and jurisdiction. The courts below properly addressed these issues and found that the district court lacked jurisdiction over the petitioners' claims.

In a unanimous opinion, a panel of the Court of Appeals for the Fourth Circuit held that the district court properly dismissed the petitioners' Complaint on the basis that the claims were not justiciable and that the Court was without jurisdiction under the Rooker-Feldman doctrine. Jordahl v. Democratic Party of Virginia, 122 F.3d 192 (4th Cir. 1997). Finding that it lacked jurisdiction, the Court of Appeals properly declined the petitioners' invitation to address the prior restraints argument, which forms the heart of the Petition for a Writ of Certiorari (hereafter referred to as "Petition"). The petitioners now seek to test their constitutional claims which were not considered by the courts below.

This brief addresses the only issues relevant to consideration of the Petition -- justiciability and jurisdiction.[1] For

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[1]This brief identifies certain misstatements of law or fact in the Petition, as required by Rule 15.2 of the

the reasons that follow, there is no important issue of law for this Court to consider.

REASONS FOR DENYING THE WRIT

The courts below thoughtfully considered the fact-specific issues as to first, justiciability, and second, jurisdiction. There are no important federal issues for this Court to decide. The constitutional issue concerning prior restraints, which is arguably the only important issue raised, is not justiciable. (App. 39-42.)[2]

The remaining issue involves the application of the Rooker-Feldman doctrine to the specific facts of this case. The petitioners' claim that the Court of Appeals' Rooker-Feldman analysis creates a conflict among the circuits is incorrect and misstates the record.

Simply put, there are no novel or important questions of law for this Court to decide.

Rules of the United States Supreme Court.

[2]"(App. __)" refers to the Appendix contained in the Petition.

I. The Petition misrepresents the Court of Appeals' finding regarding the justiciability of the claims in Count I.

The Court of Appeals correctly found that the petitioners' claims based upon prior enforcement of former versions of the election laws are moot and that their claims based upon enforcement of the current election laws are not ripe. These findings do not involve any important issue of law for this Court to consider.

First, the Court of Appeals correctly held that the petitioners' claims concerning enforcement of Virginia's former election laws are moot.

> To qualify as a case fit for federal court adjudication, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."

Arizonans for Official English v. Arizona, ___ U.S. ___, ___, 117 S. Ct. 1055, 1068 (1997) (civil case became moot on appeal) (citations omitted). Because the election laws as they existed when this dispute arose now have been materially changed, no actual controversy exists.

The statutes in question have materially altered the law so as to render the petitioners' claims moot. Of the many changes made to these statutory provisions, two deserve particular attention. First, in 1993, the term "political committee" was defined to

exclude 501(3)(c) corporations. See Virginia Code Ann. § 24.1-254.1 and Virginia Code Ann. § 24.2-901 (App. 60, 69-70, 75-77.) Second, the 1996 amendments to § 24.2-1014(B) of the Code of Virginia added the term "clearly identified candidate" and deleted the term "potential nominee." (App. 74.) The later change reflected recognition of the law as set forth in the Court's decision in McIntyre v. Ohio Elections Com'n, 514 U.S. 334 (1995), cited by the Court of Appeals. (App. 40.)

The petitioners incorrectly state that "[t]he Court of Appeals did not dispute Petitioners' contention . . . that the recodification and amendments of the VCFDA did not materially alter the law." (Petition at 15.) To the contrary, the Court of Appeals considered the history of the statutes at issue, noting that the statutes in 1993 had been twice amended and then repealed altogether and recodified. (App. 40.) Indeed, the Court of Appeals affirmed the district court's finding that the "statutes which [Petitioners] challenged are no longer the statutes in effect in Virginia." (App. 40.) Thus, an examination of the Court of Appeals' opinion confirms that the Court held that the statutes materially changed the law so as to render any claim on the former statutes moot.

The petitioners also assert that the Court of Appeals' decision conflicts with this Court's ruling in Northeastern Florida Chapter of Ass'n Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993) and a decision of the Seventh

Circuit in Rembert v. Sheahan, 62 F.3d 937 (7th Cir. 1995). First, these cases involve only insignificant changes made to a statute. These cases are not in conflict with the Court of Appeals' opinion, which found that the changes to the statutes were material. These cases, accordingly, have no bearing on the factual determination made in the present case.

Second, the Court of Appeals correctly held that the petitioners' claims based upon the current election laws are not ripe. The Court found, on the record before it, that "[n]o evidence exists that [the petitioners are] currently under an actual or threatened application of the new [Virginia Campaign Finance Disclosure Act]."[3] (App. 41.)

The petitioners, nonetheless, argue that the Court of Appeals' finding on ripeness conflicts with decisions from this Court and the circuit courts. The primary case cited by the petitioners, Renne v. Geary, 501 U.S. 312 (1991), however, supports the decision of the Court of Appeals. In Renne, this Court held that

> past exposure to illegal conduct does not itself show a present case or controversy regarding

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[3]The fact that the petitioners had been subject to injunctions in the past does not create a credible threat that Respondents will again seek injunctions. Indeed, no injunctions were sought in the 1994, 1995, 1996 and 1997 state elections.

> injunctive relief . . . if unaccompanied by any continuing, present adverse effects.

501 U.S. at 321. The petitioners have not identified any "continuing, present adverse effects." Id. In fact, all of the "harms" alleged by the petitioners in their Complaint are stated in the past tense, and relate to orders and statutes no longer in effect. Thus, there is no conflict with the decision in Renne.

2. **The Petition misrepresents the Court of Appeals' finding that there is no jurisdiction under the Rooker-Feldman doctrine.**

The petitioners incorrectly state that the underlying state court injunctions were "overturned in the state court system." (Petition at 24.) From this faulty premise, the petitioners suggest that the Court of Appeals' holding means that "a federal court lacks jurisdiction to entertain any claim for damages arising out of overturned state court judgments." (Petition at 24.) The broad reading the petitioners give to the Court of Appeals' decision is not supported by the opinion. In fact, the Court of Appeals' opinion is narrowly tailored to the specific facts before it.

First, the petitioners' argument that the injunctions were "overturned in the state court system" is factually incorrect. (Petition at 24.) Indeed, none of the injunctions were overturned. The 1989 injunctions were dismissed. (App. 34.) The 1993 Fairfax injunction

was dissolved by Order of a three justice panel of the Supreme Court of Virginia without opinion pursuant to Virginia Code § 8.01-626. (App. 35.) That statute provides that where a state circuit court grants an injunction, the aggrieved party may "present a petition for review to a justice of the Supreme Court." Virginia Code Ann. § 8.01-626.[4] However, this "summary procedure" is not "a substitute for an appeal." The Omega Corp. v. Cobb, 222 Va. 875, 876, 292 S.E.2d 44, 44 (1981). The petitioners never sought an appeal of any injunctions to the Supreme Court of Virginia. Therefore, the Supreme Court of Virginia could not have "overturned" any of the injunctions.

None of the state court injunctions, moreover, were resolved favorably to the petitioners. There were no dispositions that altered the validity of the decisions to issue the injunctions. The petitioners did not "succeed" in having the injunctions overturned in the state court. The district court may not now, in a collateral proceeding, pass upon the validity of the injunctions.

Second, the Rooker-Feldman doctrine bars a district court from reviewing "challenges to state court decisions in particular cases arising out of judicial proceedings." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983). The district court "has no authority to review final judgments of a

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[4]The text of this statute is set forth at Respondents' Appendix, p.1.

state court in judicial proceedings." Id. (emphasis added).

> A judgment is final when it is a determination of the particular action or suit, although it is not a final determination of the rights of the parties.

Brown v. Carolina, C & O Ry., 116 Va. 597, 599, 83 S.E. 981, 982 (1914). The petitioners' remedy in this case was to seek appeals of the final injunction orders to the Supreme Court of Virginia. They failed to do so. They cannot bypass direct review in the state's highest court and seek, instead, to have the district court pass upon the validity or propriety of the state court injunctions.

The petitioners suggest that the decision of the Court of Appeals conflicts with this Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994). To the contrary, the Heck decision supports the decision in this case.[5]

Heck involved a prisoner who brought a § 1983 action relating to his state court conviction for voluntary manslaughter. While his appeal to the state court was pending, Heck filed a § 1983 action in federal district court against the state court prosecutors and the state police. The district court dismissed the appeal. While his appeal

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[5]It should be noted that Heck was a criminal case that did not directly involve the Rooker-Feldman doctrine.

was pending to the Seventh Circuit, his conviction was affirmed by the state supreme court.

Drawing an analogy to the favorable termination requirement in malicious prosecution actions, this Court recognized that civil tort plaintiffs may not mount collateral attacks on their outstanding criminal convictions. Heck, 512 U.S. at 486. This Court did not address the issue as one involving the Rooker-Feldman doctrine, but rather, merely cited the decision in Rooker v. Fidelity Trust Company, 263 U.S. 413 (1923), among other cases, as "express[ing] similar concerns for finality and consistency." Id. at 484-485. This Court declared, in the context of this criminal case, that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Id. at 486-487. By comparison, the state court injunctions at issue here have never

been reversed on direct appeal or otherwise declared invalid.

Third, the petitioners incorrectly contend that the Court of Appeals' finding that the state court injunctions were judicial in character, rather than legislative, creates a conflict among the circuits. Both courts below found the specific injunctions at issue here to be judicial in character, and therefore subject to the Rooker-Feldman bar. (App. 27-28, 47-49.) These findings were based upon the fact-specific inquiry required for such a determination. See Feldman, 460 U.S. at 482 (in determining whether the proceeding is judicial, "the nature and effect" of the proceeding is controlling.)

The petitioners cite to three federal circuit court cases which they claim conflict with the Court of Appeals' decision. (Petition at 29.) These cases, however, do not involve the factual issue before the Court of Appeals in this case. Indeed, in Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993), vacated on other grounds, 41 F.3d 1421 (11th Cir. 1994), the issue did not even arise in a Rooker-Feldman context. In its opinion, the Court of Appeals distinguished the holding in Cheffer. (App. 48-49.) That case, then, does not conflict with the decision of the Court of Appeals in the case at bar.

Nor does the decision in Hoover v. Wagner, 47 F.3d 845 (7th Cir. 1995), conflict with the Court of Appeals' decision. (Petition at 29.) The Court's statement in Hoover

that "[i]njunctions often do function quite like statutes" was dictum. Id. at 849. Likewise, the decision in Henson v. East Lincoln Township, 814 F.2d 410 (7th Cir. 1987), cert. dismissed, 506 U.S. 1042 (1993), does not conflict with the Court of Appeals' decision. In Henson, the Court held that a double class action is a "legislative or regulatory device." Id. at 416. The decision in Henson, then, is limited to its facts. Consequently, the Court of Appeals' finding that the injunction proceedings were judicial does not conflict with any of the cases cited by the petitioners.

Finally, there is no conflict among the circuits as to whether Rooker-Feldman applies to damages claims arising out of ex parte state court injunctions. The cases cited by the petitioners dealt with entirely different factual scenarios than the case at bar. The Court of Appeals addressed this argument, finding that the petitioners had been given an opportunity to be heard or to state objections in the state court proceedings. (App. 53.) Thus, the petitioners' attempt to create a conflict among the circuits on this issue is without merit.

CONCLUSION

The Petition for a Writ of Certiorari should not be granted.

Dated: December 23, 1997

Respectfully submitted,

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Virginia Code § 8.01-626 (Michie 1992)

§ 8.01-626. When court grants or refuses injunction, justice of Supreme Court or judge of Court of Appeals may review it. -- Wherein a circuit court (i) grants an injunction or (ii) refuses an injunction or (iii) having granted an injunction, dissolves or refuses to enlarge it, an aggrieved party may, within fifteen days of the court's order, present a petition for review to a justice of the Supreme Court; however, if the issue concerning the injunction arose in a case over which the Court of Appeals would have appellate jurisdiction under § 17-116.05 or § 17-116.05:1, the petition for review shall be initially presented to a judge of the Court of Appeals within fifteen days of the court's order. The petition shall be accompanied by a copy of the proceedings, including the original papers and the court's order respecting the injunction. The justice or judge may take such action thereon as he considers appropriate under the circumstances of the case.

When a judge of the Court of Appeals has initially acted upon a petition for review of an order of a circuit court respecting an injunction, a party aggrieved by such action of the judge of the Court of Appeals may, within fifteen days of the order of the judge of the Court of Appeals, present a petition for review of such order to a justice of the Supreme Court if the case would otherwise be appealable to the Supreme Court in accordance with § 17-116.07. The petition shall be accompanied by a copy of the

proceedings before the circuit court, including the original papers and the circuit court's order respecting the injunction, and a copy of the order of the judge of the Court of Appeals from which review is sought. The justice may take such action thereon as he considers appropriate under the circumstances of the case.

(4)

Supreme Court, U.S.
FILED
JAN 6 1998
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No. 97-859

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

VERN T. JORDAHL, MARY-BETH LAROCK, and VIRGINIA LEADERSHIP COUNCIL,

Petitioners,

v.

DEMOCRATIC PARTY OF VIRGINIA, RICHMOND CITY DEMOCRATIC COMMITTEE, and COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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32 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. THE CHANGES TO VIRGINIA'S ELECTION LAWS ARE NOT MATERIAL TO THE ISSUES PETITIONERS HAVE RAISED. 1

A. Respondents Fail to Identify Any *Material* Changes in the Law. 1

B. The Court of Appeals Did Not Consider Whether the Statutory Recodification and Amendments Are Material. 2

C. In the *VSHL* Companion Case, the Court of Appeals Recently Confirmed that the Statutory Amendments Are Not Material, And that the Statutes May Still Be Employed to Silence Speech. 3

II. PETITIONERS' FIRST AMENDMENT CHALLENGE IS JUSTICIABLE. 4

A. The *VSHL* Panel's Justiciability Ruling Conflicts with the Justiciability Ruling of the Court Below. 4

B. The Enforcement Record Here Establishes a Credible Threat of Future Enforcement. 6

III. THE DEMOCRATIC PARTY DOES NOT DEFEND THE COURT OF APPEALS' *ROOKER-FELDMAN* HOLDING. 8

IV. THE DEMOCRATIC PARTY DOES NOT DISPUTE THAT IT INITIATED THE UNDERLYING INJUNCTIONS *EX PARTE*. 10

TABLE OF AUTHORITIES

CASES

Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 89 S. Ct. 347 (1968) 10

City of Houston v. Hill, 482 U.S. 451, 107 S. Ct. 2502 (1987) 4

Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994) 8

Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994), *cert. denied*, 513 U.S. 1111, 115 S. Ct. 901 (1995) 10

Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118 (1984) 5

New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495 (10th Cir. 1995) 7

O'Shea v. Littleton, 414 U.S. 488, 94 S. Ct. 669 (1974) 6

Omega Corp. v. Cobb, 222 Va. 875, 292 S.E.2d 44 (1981) 9

Renne v. Geary, 501 U.S. 312, 111 S. Ct. 2331 (1991) 6, 7

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149 (1923) 9, 10

Steffell v. Thompson, 415 U.S. 452, 94 S. Ct. 1209 (1974) 5

Virginia v. American Booksellers Ass'n, 484 U.S. 383, 108 S. Ct. 636 (1988) 7

STATUTES

2 U.S.C. § 453 7

Va. Code § 8.01-626 8

Va. Code § 24.2-901 1

Va. Code § 24.2-910 3

Va. Code § 24.2-1014(B) 1

I. THE CHANGES TO VIRGINIA'S ELECTION LAWS ARE NOT MATERIAL TO THE ISSUES PETITIONERS HAVE RAISED.

A. Respondents Fail to Identify Any *Material* Changes in the Law.

Virginia argues that Petitioners' prior restraint challenge is moot because of the intervening statutory recodification and amendments, but Virginia does not explain why or how these changes are material. Because the changes are not material to the issues raised in this case, they do not moot Petitioners' challenge.

The Democratic Party identifies two allegedly significant changes in the law. First, in 1994 the Virginia General Assembly excluded organizations holding tax-exempt status under § 501(c)(3) of the Internal Revenue Code from the definition of "political committees" under Va. Code § 24.2-901. Democratic Party Br. at 3-4. Second, the 1996 amendment to Va. Code § 24.2-1014(B), which requires that written material discussing candidates for elective office contain attribution statements, deleted the term "potential nominee or candidate" and replaced it with "clearly identified candidate." *Id.*

Both of these changes are irrelevant to the issues Petitioners have raised. Petitioners do not hold tax exempt status, and thus do not fall within this exception to Va. Code § 24.2-901. Further, Petitioners' voter guides describe the policy positions taken by clearly identified candidates, *i.e.*, the major parties' nominees for state-wide office. This amendment to Va. Code § 24.2-1014(B) thus does *nothing* to prevent the Democratic Party from once again enjoining Petitioners' distribution of voter guides.

B. The Court of Appeals Did Not Consider Whether the Statutory Recodification and Amendments Are Material.

Virginia and the Democratic Party both assert that the Court of Appeals held that the intervening statutory recodification and amendments materially changed the law. Democratic Party Br. at 4; Virginia Br. at 6. Contrary to these assertions, in holding that Petitioners' prior restraint challenge was mooted by the recodification and amendments, the Court of Appeals did not pause to consider or analyze whether these changes were material to Petitioners' challenge.

The Democratic Party cites the Court of Appeals' statement that "the statutes which the [Petitioners] challenged are no longer the statutes in effect in Virginia." Democratic Party Br. at 4 (*quoting* Pet. App. at 40, 122 F.3d at 197-98). This statement merely acknowledges that the relevant election laws have been repealed and recodified. It contains no analysis suggesting that the recodification was *material* to this case.

Virginia claims that "the Fourth Circuit also recognized that Virginia's General Assembly had amended the challenged provisions 'to narrow their reach.'" Virginia Br. at 6 n.4. In this passage, the District Court (not the Court of Appeals) merely acknowledges what is undisputed, namely, that in 1996 the Virginia General Assembly narrowed Virginia election law as it applies to speech concerning election *referenda*. *See* Pet. at 9-10. None of the 1996 amendments, however, narrowed the law as it applies to speech concerning *candidate* elections. It is this type of core political speech that has been the subject of the underlying enforcement actions, and it is this type of speech that the challenged statutes "chill and deter." First Amended Complaint ¶ 39.

C. In the *VSHL* Companion Case, the Court of Appeals Recently Confirmed that the Statutory Amendments Are Not Material, And that the Statutes May Still Be Employed to Silence Speech.

In the *VSHL* companion case, a different panel[1] of the Court of Appeals very recently confirmed that the statutory recodification and amendments are not material. On December 19, 1997, the *VSHL* panel ruled that with respect to the VCFDA's regulation of speech concerning *candidate* elections, the 1996 amendments are *"irrelevant."*[2] Supp. App. at 14 (emphasis added). The *VSHL* panel further ruled that the VCFDA and its injunction enforcement mechanism still remain available to suppress speech in candidate elections. Supp. App. at 3 n.1.

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[1] The Court of Appeals panel in this case consisted of Circuit Judges Widener, Murnaghan and Phillips. The *VSHL* panel consisted of Circuit Judges Murnaghan and Wilkins and District Judge Herlong. Judge Murnaghan authored both decisions.

[2] The *VSHL* panel raised and dismissed the possibility that the 1996 deletion of Va. Code § 24.2-910(B)(3) (which had required a person or political committee to report funds spent in promoting or opposing referendum questions) was material to candidate election speech. Supp. App. at 14-15. The deletion of Va. Code § 24.2-910(B)(3) plainly represents no material change in the law with respect to *candidate* election speech. The only effect of this section's deletion is that persons who do not receive contributions now are not required to report their expenditures concerning election *referenda*. All expenditures (regardless of whether by "political committees" or by persons) in *candidate* elections must still reported. *See* Va. Code § 24.2-910(A) (political committees); Va. Code § 24.2-910(B) (persons).

II. PETITIONERS' FIRST AMENDMENT CHALLENGE IS JUSTICIABLE.

A. The *VSHL* Panel's Justiciability Ruling Conflicts with the Justiciability Ruling of the Court Below.

The *VSHL* panel ruled that the *VSHL* plaintiffs' First Amendment challenge to the VCFDA is justiciable because the VCFDA's "plain terms" apply to the *VSHL* plaintiffs' speech, and because there is a threat of private parties "suing to enjoin VSHL's distribution of campaign literature based on the statutes." Supp. App. at 3 n.1.[3] Like Petitioners here, the *VSHL* plaintiffs engage in issue advocacy in Virginia candidate elections. Unlike Petitioners here, however, the *VSHL* plaintiffs have never before been enjoined under the VCFDA. On the question of justiciability, then, the Court of Appeals' holdings in this case and in *VSHL* are incongruous.

Justiciability does not turn on whether a challenge to a statute is facial or as applied, notwithstanding the Court of Appeals' holding, *see* Pet. App. 40-43, 122 F.3d at 198-99, or Virginia's suggestion. *See* Virginia Br. at 4.

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[3] Rather than reaching the merits, however, the *VSHL* panel certified to the Supreme Court of Virginia the question of whether the VCFDA applies to "issue advocacy" speech in candidate elections. Supp. App. at 3. The *VSHL* panel did so notwithstanding (1) that the Virginia Supreme Court previously rejected a similar certified question from the District Court in *VSHL*, *see id.* at 2; (2) its own conclusion that the VCFDA is not "readily susceptible" of the narrow, saving construction given to it by the District Court, *see id.* at 3, 7; and (3) this Court's holding in *City of Houston v. Hill*, 482 U.S. 451, 471, 107 S. Ct. 2502, 2514-15 (1987), that certification in these circumstances is thus not appropriate.

Indeed, in *Steffell v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209 (1974), this Court rejected exactly this distinction and instead held that the relevant inquiry is whether there is a "genuine threat of enforcement of a disputed state . . . statute, [regardless of] whether an attack is made on the constitutionality of the statute *on its face or as applied.*" *Id.* at 475, 94 S. Ct. at 1223-24 (emphasis added). The same threat of enforcement identified by the *VSHL* panel that creates a justiciable controversy there creates a justiciable controversy *here*, regardless of whether Petitioners' prior restraint challenge is deemed facial or as applied.[4]

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[4] The facial/as applied distinction is relevant not to *justiciability*, but rather to the scope of the *remedy*, *i.e.*, whether a challenged statute is unconstitutional against the challenger only or in every conceivable application. *See Steffell*, 415 U.S. at 474, 94 S. Ct. at 1223. Even if this distinction were relevant, Petitioners facially challenge the VCFDA with its injunction enforcement mechanism because they allege that as an unconstitutional system of prior restraint, it is unconstitutional in all its applications. First Amended Complaint ¶ 67. *See Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-97, 104 S. Ct. 2118, 2124 (1984) (systems of prior restraint are unconstitutional not only as applied, but also "on their face because it [is] apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas"). The *VSHL* plaintiffs, in contrast, have asserted a facial *overbreadth* challenge to the VCFDA. *See id.* at 796, 104 S. Ct. at 2124 (distinguishing between two "quite different" bases for a facial challenge to a statute: "either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'").

B. The Enforcement Record Here Establishes a Credible Threat of Future Enforcement.

Neither Virginia nor the Democratic Party address this Court's cases that hold that *prior* enforcement of a statute establishes a "credible threat" of future enforcement, and thus a justiciable controversy concerning the statute. *See* Pet. at 16-17. Instead, both Virginia and the Democratic Party rely (as did the Court of Appeals, *see* Pet. App. 41) upon this Court's statement in *Renne v. Geary*, 501 U.S. 312, 111 S. Ct. 2331 (1991) that "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects.'" *Id.* at 320-21, 111 S. Ct. at 2338 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S. Ct. 669, 676 (1974)).

Preliminarily, Petitioners allege that there are "continuing, present adverse effects" resulting from the prior enforcement of the challenged statutes, namely, the chilling and deterrence of their speech in Virginia elections. First Amended Complaint ¶ 39. Furthermore, this Court explained in *O'Shea* that "past wrongs are evidence bearing on whether there is real and immediate threat of repeated injury." *Id.* Indeed, this Court noted that past wrongs take on particular significance with respect to *threatened* injury to the extent that they involve, as here, past enforcement of a statute that is alleged to be "unconstitutional on its face or as applied." *Id.* Thus, in *Renee*, this Court held that the complete *absence* of any prior enforcement actions against the plaintiffs under the challenged state constitutional provision showed that there was no "credible threat" of future enforcement. *See Renne*, 501 U.S. at 322, 111 S. Ct. at 2339. Because there was no

such threat, this Court held that the First Amendment challenge was not justiciable.[5] *Id.*

Here, the Democratic Party has expressly reserved its claimed prerogative to bring future enforcement actions under the VCFDA.[6] *See* Pet. at 18. While Virginia argues that the Virginia Supreme Court's dissolution of the most recent prior restraint is evidence of the unlikelihood of future enforcement actions, *see* Virginia Br. at 6 n.3, the Democratic Party views the Virginia Supreme Court's order as meaningless. *See* Democratic Party Br. at 6-7. In view of the past enforcement actions, as well as the Democratic Party's stated willingness to enforce the statute by injunction in the future, Petitioners have "an actual and well-founded fear that the law will be enforced against them." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393, 108 S. Ct. 636, 643 (1988).

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[5] The Court of Appeals' interpretation of *Renne*'s ripeness standard conflicts with the Tenth Circuit's, which reads *Renne*, as Petitioners do here, as turning on the absence of any "credible threat" that the challenged provision would be enforced against the *Renne* plaintiffs. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1501 n.1 (10th Cir. 1995).

[6] The Democratic Party notes that it did not seek to enforce the challenged statutes in Virginia elections in 1994, 1995, 1996, and 1997. Democratic Party Br. at 5 n.3. Virginia's 1994 and 1996 elections, however, were exclusively *federal* elections, and in such elections the Federal Election Campaign Act expressly preempts state campaign finance laws such as the VCFDA. *See* 2 U.S.C. § 453. With respect to the 1995 and 1997 elections, this action and *VSHL* were commenced on October 2, 1995, one month before the 1995 elections. Both sought injunctive relief, and the District Court in *VSHL* preliminarily enjoined Virginia's enforcement of the VCFDA.

III. THE DEMOCRATIC PARTY DOES NOT DEFEND THE COURT OF APPEALS' *ROOKER-FELDMAN* HOLDING.

The Democratic Party neither defends nor agrees with the Court of Appeals' broad holding that a federal court *never* has jurisdiction under *Rooker-Feldman* and *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994) to award damages arising out of state court injunctions, even if such injunctions have been overturned. Instead, after asserting without analysis that the Court of Appeals' *Rooker-Feldman* holding is not so broad, the Democratic Party argues that the *result* of this decision actually comports with *Heck* because the underlying injunctions were not overturned. Democratic Party Br. at 6, 7, 10.

The Court of Appeals here certainly understood that there had been a "dissolution of the state courts' injunctions." Pet. App. at 49, 122 F.3d at 201. *See also id.* at 53, 122 F.3d at 203 n.11 ("LaRock . . . *appealed* the 1993 Fairfax injunction to the Virginia Supreme Court, which summarily dissolved the state court injunction.") (emphasis added). More importantly, whether the injunctions were overturned in favor of Petitioners is, at most, a *merits* question that goes to whether Petitioners have stated a claim under § 1983.[7] For *Rooker-Feldman* jurisdictional

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[7] *Heck* holds that a claim for § 1983 damages arising out of a state court criminal judgment states a claim to the extent that the judgment has "been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87, 114 S. Ct. at 2372. The state courts' dissolution of the underlying injunctions here satisfies this standard. In 1993, the Virginia Supreme Court summarily dissolved the Fairfax Circuit Court injunction pursuant to Va. Code § 8.01-626. This statute provides for expedited appellate

purposes, the dispositive question here is whether the underlying state court injunctions are still *outstanding*:

> If the [state court] decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. *Unless and until so reversed or modified*, it would be an effective and conclusive adjudication. Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to *reverse* or *modify* a judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S. Ct. 149, 150 (1923) (emphasis added, citations omitted). Once

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review of *interlocutory* injunctions, and Petitioners successfully employed this procedure in 1993 to overturn the Fairfax Circuit Court's injunction. *Omega Corp. v. Cobb*, 222 Va. 875, 292 S.E.2d 44 (1981), cited by the Democratic Party (Br. at 7), holds that this procedure is no substitute for an appeal when an injunction is entered in "a *final judgment*." *Id.* at 876, 292 S.E.2d at 44 (emphasis added). Because the injunction entered against Petitioners was *interlocutory*, and because it was dissolved by the Virginia Supreme Court, there was no final judgment enjoining Petitioners necessary to appeal. In 1994, in the wake of the Virginia Supreme Court's dissolution of the 1993 Fairfax injunction, the Fairfax Circuit Court dismissed the injunction that had been entered by that court in 1989. The City of Richmond Circuit Court's 1989 temporary injunction lapsed, and the action was thereafter dismissed for failure to prosecute. In each instance, the state courts overturned or invalidated the injunctions.

a state court injunction has been reversed or vacated in the state court system, it is no longer an "effective and conclusive adjudication," and there is nothing for a federal district court to "reverse or modify." *Id.* Thus, to the extent that a federal court may grant federal relief without *reversing* a state court order or judgment, *Rooker-Feldman* does not bar federal jurisdiction over the action. *Marks v. Stinson*, 19 F.3d 873, 886 n.11 (3d Cir. 1994), *cert. denied*, 513 U.S. 1111, 115 S. Ct. 901 (1995). Because the District Court here would not be called upon to reverse the underlying injunctions (none of which are still in effect), the District Court has original jurisdiction over Petitioners' damages claims.

IV. THE DEMOCRATIC PARTY DOES NOT DISPUTE THAT IT INITIATED THE UNDERLYING INJUNCTIONS *EX PARTE*.

The Democratic Party does not dispute that it initiated the underlying injunctions *ex parte*. Instead, it asserts that the post-issuance hearings afforded the Petitioners sufficient opportunities to object to the already issued injunctions. Democratic Party Br. at 11. In *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347 (1968), however, this Court specifically held that such *post-issuance* hearings do not cure the due process and First Amendment deficiencies inherent in *ex parte* restraints of speech. *Id.* at 184, 89 S. Ct. at 347. Additionally, the decision below conflicts with those of other circuits, which would permit Petitioners to seek § 1983 redress for the injury occasioned by these *ex parte* injunctions because there was no full and fair opportunity to contest their issuance at the outset of the state court proceedings. *See* Pet. at 30-31.

DATED: January 5, 1998

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1292

VIRGINIA SOCIETY FOR HUMAN LIFE, INCORPORATED; ANDREA SEXTON,
Plaintiffs-Appellants,

versus

DONALD S. CALDWELL, Attorney for the Commonwealth of Virginia for the City of Roanoke, in his official capacity and as a representative of the class of Attorneys for the Commonwealth of Virginia; PAMELA M. CLARK, in her official capacity as Chairman of the Virginia Board of Elections; GEORGE M. HAMPTON, SR., Dr., in his official capacity as vice-Chairman of the Virginia Board of Elections; M. BRUCE MEADOWS, in his official capacity as Secretary of the Virginia Board of Elections,
Defendants-Appellees.

ORDER OF CERTIFICATION
[Filed: December 19, 1997]

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

The case involves a proceeding pending before the United States Court of Appeals for the Fourth Circuit as to which there is no controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia. Accordingly, we request that the Supreme Court of Virginia exercise its certification jurisdiction pursuant to article VI, section 1 of the Virginia Constitution and Rule

5:42 of the Rules of the Supreme Court of Virginia and decide the certified question.

I. Nature of the Controversy

This case involves a challenge to Virginia's election laws, Va. Code Ann. §§ 24.2-901, -908, -910(B) & -1014(B) (Michie 1997). The Virginia Society for Human Life (VSHL), the plaintiff-appellant, is a nonprofit organization that purportedly engages only in issue advocacy, but does not expressly advocate the election or defeat of any candidate. VSHL and one of its members sued Virginia's Commonwealth's Attorneys, alleging that these laws chilled their constitutionally protected speech because they had been used to impose unconstitutional prior restraints on issue advocacy groups in the past, and seeking a declaration that the referred to provisions of the election law facially violate the First Amendment to the United States Constitution.

The district judge first certified to the Supreme Court of Virginia the question whether the laws could be saved by narrowly construing them, but the Court rejected the question. The district judge then himself narrowly construed the laws in such a manner that they did not apply to VSHL and dismissed the case for lack of standing. Because that ruling by the federal district court is not binding upon state courts, it does not protect VSHL from having the allegedly unconstitutional statutes applied against it in the future.[1] VSHL therefore brought this appeal.

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[1] This case presents a live controversy even though the district court found that the challenged statutes did not apply to VSHL. VSHL may still bring a facial challenge to the statutes, and they still chill protected speech, because the district court's finding that VSHL need not comply with the statutes is not binding on Virginia courts. A federal district court "lack[s] jurisdiction authoritatively to construe state legislation." *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 369 (1971). As the Seventh Circuit has explained:

A federal court is without power to avoid a constitutional question by providing a narrowing construction of a state statute unless the statute is "readily susceptible" of such construction. It is not apparent to us that the election laws at issue are readily susceptible to a construction by which they do not apply to VSHL. Rather than simply reversing the district court's dismissal and remanding for an evaluation of the merits of VSHL's constitutional challenge, however, we believe that the Supreme Court of Virginia should be given another chance authoritatively to interpret its laws so as to cure any constitutional infirmity.

II. The Question of Law to be Answered

Whether Va. Code Ann. §§ 24.2-901, -908, -910 & -1014 apply to issue advocacy groups, or whether the use of the phrase "for the purpose of influencing the outcome of an election" and related phrases limits the application of those statutes to groups that expressly advocate the election or defeat of a particular candidate.

> [A]n important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative. If the district judge [reads the state's] statute so narrowly as to obviate all constitutional questions, it would still be possible for the state to prosecute people for violating the statute as broadly construed, because the enforcement of the statute would not have been enjoined.

Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990). In this case, the district judge's finding that the statutes at issue do not apply to VSHL does not prevent a private party from suing to enjoin VSHL's distribution of campaign literature based on the statutes, nor does it prevent the state from prosecuting VSHL for failing to comply with the statutes. Because the scope of the statutes' applicability has not authoritatively been narrowed, and by their plain terms they apply to VSHL, VSHL's speech is still chilled by the statutes.

III. Statement of Facts Relevant to the Question Certified

VSHL is a nonprofit organization that conducts issue advocacy by periodically preparing voter guides, which do not expressly advocate the election or defeat of any candidate but rather state the candidates' views on public issues.[2] *See Virginia Soc'y for Human Life, Inc. v. Caldwell,* 906 F. Supp. 1071, 1072 (W.D. Va. 1995). Election laws in Virginia require certain people or organizations who spend money "for the purpose of influencing the outcome of any election," Va. Code Ann. § 24.2-901 (Michie 1997), to file a statement of organization, Va. Code Ann. § 24.2-908 (Michie 1997), and report their expenditures, Va. Code Ann. § 24.2-910 (Michie 1997), and also require any writings made "for the purpose of influencing the outcome of an election for public office" to identify the author, Va. Code Ann. § 24.2-1014 (Michie 1997). Those statutes are probably unconstitutional under the Supreme Court's decisions in *Buckley v. Valeo,* 424 U.S. 1, 78-80 (1976) (per curiam) (interpreting federal election laws that require the disclosure of expenditures to apply only to expenditures used expressly to advocate the election or defeat of a clearly identified candidate, thereby avoiding the First Amendment problems that would arise from a reporting requirement that applied to funds expended in issue discussion), and *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 357 (1995) (holding that an Ohio statute prohibiting anonymous issue advocacy was an unconstitutional abridgment of speech), if the statutes apply to issue advocacy groups like VSHL. VSHL asserts that predecessors to the current statutes have repeatedly been used on the eve of past elections to impose unconstitutional prior restraints on protected issue advocacy.

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[2] We have assumed for purposes of this appeal that VSHL conducts only issue advocacy, as they asserted in their pleadings.

VSHL challenged the constitutionality of the statutes and sought an injunction barring their enforcement. The district court recognized that the plain language of the statutes suggests that they apply to issue advocacy groups such as VSHL. *See Virginia Soc'y for Human Life, Inc.*, 906 F. Supp. at 1074-76. Because there is little Virginia case law interpreting the statutes, the court certified to the Supreme Court of Virginia the question whether they were susceptible to a narrowing construction that would save their constitutionality. *See* J.A. at 106 (Order of Certification to the Supreme Court of Virginia).

The Supreme Court of Virginia "rejected" the certified questions without explanation on January 18, 1996. About four months later, the Virginia General Assembly amended the statutes (the parties contest the materiality of the amendments). To save their constitutionality, the district court narrowly construed the new provisions based on the Supreme Court's interpretation of the *federal* election laws in *Buckley,* 424 U.S. at 79-80 (1976). The district court found that the phrase "for the purpose of influencing" in the Virginia statutes was "a term of art whose well-established meaning excludes issue advocacy." J.A. at 309 (Memorandum Opinion of Feb. 19, 1997). Because VSHL conducts only issue advocacy and not express candidate advocacy, the district court dismissed VSHL's claim for lack of standing. *See id.* at 312. VSHL brought this appeal.

IV. Names of the Parties

Plaintiffs - Appellants:

Virginia Society for Human Life, Inc.
Andrea Sexton

Defendants - Appellees:

Donald S. Caldwell, Attorney for the Commonwealth of Virginia for the City of Roanoke, in his official capacity and

as a representative of the class of Attorneys for the Commonwealth of Virginia.

Pamela M. Clark, in her official capacity as Chairman of the Virginia Board of Elections.

Dr. George M. Hampton, Sr., in his official capacity as Vice-Chairman of the Virginia Board of Elections.

M. Bruce Meadows, in his official capacity as a Secretary of the Virginia Board of Elections.

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VI. The Certified Question is Determinative of the Proceeding in this Court

As discussed above, the district court narrowly construed the contested election laws based on the Supreme Court's interpretation of the federal election laws in *Buckley v. Valeo,* 424 U.S. 1, 79-80 (1976) (per curiam). The district court found that the phrase "for the purpose of influencing"

in the Virginia statutes was "a term of art whose well-established meaning excludes issue advocacy." J.A. at 309 (Memorandum Opinion of Feb. 9, 1997). It did so because it believed that where a "statute [is] reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that a [sic] construction which will save the statute from constitutional infirmity." *Id.* at 310 (quoting *United States ex rel. Attorney General of the United States v. Delaware and Hudson Co.*, 213 U.S. 366, 407 (1909) (regarding a federal statute)) (internal quotation marks omitted).

Federal courts have the power and the duty to adopt narrowing constructions of federal statutes to avoid constitutional difficulties "if such a construction is fairly possible," but "federal courts are without power to adopt a narrowing construction of a *state* statute unless such a construction is reasonable and readily apparent." *Boos v. Barry*, 485 U.S. 312, 330-31 (1988) (emphasis added). We are not convinced that the narrow construction of Virginia's election laws was "readily apparent." In fact, a *de novo* review of the text, structure and history of the election laws at issue suggests to us that they do apply to issue advocacy groups such as VSHL.

A straightforward reading of the text supports VSHL's claims that its issue advocacy is encompassed within "expenditures for the purpose of influencing the outcome of any election." Va. Code Ann. § 24.2-901 (Michie 1997). *Black's Law Dictionary* defines "influence" as "[t]o affect, modify or act upon by physical, mental or moral power, especially in some gentle, subtle, and gradual way," *id.* at 779 (6th ed. 1990). *Webster's* defines "influence" as "to affect or alter the conduct, thought, or character of by indirect or intangible means." *Webster's Third New International Dictionary* 1160 (1993). Under either definition, the voter guides published by VSHL setting out candidates' positions

on public issues such as abortion are clearly intended to influence the outcome of an election.

Furthermore, section 901(B) specifically excludes from the definition of "political committee"[3] those organizations that do not engage in express candidate advocacy *if* they are also tax-exempt under 26 U.S.C. § 501(c)(3).[4] The most logical reading of this provision is that an organization that does not engage in express advocacy but is *not* tax-exempt under § 501(c)*(3) is* included as a "political committee." *Expressio unius est exclusio alterius.* VSHL does not engage in express advocacy, but is tax exempt under 26 U.S.C. § 501(c)*(4),* not § 501(c)*(3), see* J.A. at 120 (Amended Verified Complaint of July 12, 1996), and thus is included in the definition of "political committee."

The district court asserted that the Virginia General Assembly "presumably was aware of *Buckley*'s construction of the phrase 'for the purpose of influencing' to include only express candidate advocacy" when it enacted and amended sections 24.2-901 to -1014 . J.A. at 310 (Memorandum Opinion of Feb. 19, 1997). However, it is extremely unlikely that the General Assembly, after reading *Buckley* and learning that the term "for the purpose of influencing" was unconstitutionally vague and required a narrowing construction to save it, would then decide to use that term, without explanation, in its statute. If the General Assembly meant to define "political committee" as an organization which expended funds "for express candidate advocacy" only, it would have said so explicitly.

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[3] And from the definitions of "political action committee" and "person" as well.

[4] The exclusion is only for the purpose of certain sections of the chapter, including sections 24.2-908 & 910.

The language of section 24.2-910, in conjunction with the definition of "expenditure" in section 24.2-901, provides further evidence that the Virginia election code is intended to regulate issue advocacy groups. Section 24.2-910(B) requires any person who makes independent expenditures of a minimum amount to maintain records and report those expenditures. The expenditures to be reported explicitly include *not only* "funds expended for the purpose of influencing the outcome of any election for public office," Va. Code Ann. § 24.2-910(B)(1) (Michie 1997), but also funds expended to publish "any material referring to a candidate by name, description, or other reference and (I) advocating his election or defeat, (ii) setting forth his position on any public issue, voting record, or other official acts, or (iii) otherwise designed to influence individuals to cast their votes for or against him." Va. Code Ann. § 24.2-910(B)(2) (Michie 1997). This subsection was obviously intended to refer not only to express candidate advocacy, but also to materials which simply describe a candidate's voting record in the hopes of influencing people's votes, that is, issue discussion.

A look at the recent amendments to section 24.2-910 confirms the unlikelihood of the district court's interpretation. When this case was originally filed, the statute required "any person or political committee making independent expenditures" to "maintain records and report . . . expenditures made of: . . . 3. Any funds in any amount expended to publish or broadcast to the public any material promoting or opposing a question submitted to the voters in a referendum." Va. Code Ann. § 24.2-910 (Michie 1995); *see also* 1996 Va. Acts ch. 1042 (reproduced in J.A. at 149-50). The district court held that the Virginia General Assembly intended the phrase "for the purpose of influencing the outcome of an election" in the definition of "expenditure" to mean only "expenditures for express candidate

advocacy." J.A. at 311 (Memorandum Opinion of Feb. 19, 1997). If this were correct, then the pre-amendment section 24.2-910(B)(3) would mean that a person must report funds spent for express candidate advocacy regarding questions submitted to the voters in a referendum. The statute is simply not readily susceptible of this interpretation.

As with the definition of "political committee," if the General Assembly had meant to require reporting only of funds expended on materials that expressly advocated the election or defeat of a candidate, it would have said so explicitly. In fact it said just that in subsection 24.2-910(B)(2)(I) — and then went on in subsections (ii) and (iii) to require the reporting of funds spent on other materials. It appears to us that the Assembly meant to regulate those other materials as well.

Of course the Supreme Court of Virginia may impose a narrowing construction upon these statutes if it determines that such a construction would be correct. If it chooses to do so, we will then evaluate the constitutionality of the statutes as the Supreme Court of Virginia has authoritatively construed them. We may then either dismiss the case for lack of standing or strike the statute because it is unconstitutional, as appropriate. But should the Supreme Court of Virginia decline to narrow the statutes, we will not adopt a narrowing construction but will instead evaluate their constitutionality in light of *Buckley* and *McIntyre*.

VII. Relevant Decisions of the Supreme Court and Court of Appeals of Virginia, and Why These Decisions are not Controlling

A. Virginia Circuit Court Cases Suggest That the Statutes Apply to Issue Advocacy

No Virginia appellate court has interpreted the statutes at issue. The statutes have been applied by Virginia trial

courts,[5] and these opinions suggest that the statute does apply to issue advocacy groups. *See Democratic Party of Virginia v. The Family Foundation,* No. 132062 (Fairfax County Cir. Ct. Oct. 27, 1993), *injunction dissolved,* No. [no number] (Va. Nov. 1, 1993); *Democratic Party of Virginia v. Committee for Providing Truth in Political Candidate Positions,* No. 113693 (Fairfax County Cir. Ct. Nov. 6, 1989); *Roberts v. Virginia Leadership Council,* No. N-8489-4 (Richmond Cir. Ct. Nov. 4, 1989); *see also* J.A. at 22-25, 43-73 (Verified Complaint of Oct. 2, 1995) (citing and appending trial court opinions).

These trial court decisions were based on previous versions of the since-amended law. *See* J.A. at 109 (Order of Certification to the Supreme Court of Virginia) ("On several occasions, state circuit courts have not only broadly construed similar provisions of the predecessor to Virginia's Campaign Finance Disclosure Act, the Fair Election Practice Act, Va. Code Ann. §§ 24.1-252 to 24.1-263.1 (repealed 1993), but also have relied on those similarly worded provisions to impose unconstitutional prior restraints."). Despite VSHL's repeated assertions that the old "statutory language . . . is identical in all substantive respects to the provisions at issue here," Brief of Appellants at 9-10, we are uncertain whether intervening amendments and advisory opinions of the Virginia Attorney General might not influence Virginia courts to interpret the modern statutes differently, *see* Brief of Appellees at 5 & n.4. Furthermore, the

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[5] In *City of Houston v. Hill,* 482 U.S. 451 (1987), the Supreme Court invalidated a state law based on the interpretation given it by city municipal courts, even though the state appellate courts had never had an opportunity to construe it, *see id.* at 469-70. "[T]rial court interpretations," the Supreme Court recognized, "constitute 'a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance.' " *Id.* at 470. (quoting *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949)).

most recent prior restraint (in 1993) was dissolved without opinion by the Supreme Court of Virginia. *See* J.A. at 73 (Order of Nov. 1, 1993). In sum, the Virginia case law is not clear in interpreting the statutes at issue.

B. Statements of State Officials Are Not Dispositive

Although the district court did not explicitly rely on any statements of state officials in construing the laws at issue, both parties point to statements that they believe apply. VSHL notes that the Secretary of the State Board of Elections in 1989 attested that a predecessor to section 24.2-908 applied to organizations engaged in issue advocacy. *See* J.A. at 47-49 (affidavit). The Commonwealth's Attorneys point to the 1995 Report of the Attorney General of Virginia in which he opined that the parts of Va. Code Ann. § 24.2-1014 (Michie 1995) (since amended) would not survive constitutional challenge in light of *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), although the remainder of the statute could in his opinion be interpreted to be consistent with both *McIntyre* and *Buckley v. Valeo*.[6] *See* 1995 Op. Va. Att'y Gen. 170, 172-77.

It is unclear how much weight, if any, we should give to these interpretations. The Supreme Court has relied upon the interpretation given to a law by those charged with its en-

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[6] To the extent that section 24.2-1014 prohibited anonymous writings concerning referenda, the Attorney General opined that it was unconstitutional. *See* 1995 Op. Va. Att'y Gen. 170, 172. However, he believed that the remainder of section 24.2-1014 could be interpreted only to prohibit anonymous express candidate advocacy, and thus would be constitutional. *See id.* at 175-76. This opinion discussed only section 24.2-1014, not sections 24.2-901, -908, or -910. Furthermore the version of section 24.2-1014 discussed therein did not contain the language "for the purpose of influencing" added by the 1996 amendment, although the Attorney General referred to that phrase and the Supreme Court's narrowing construction of it in his discussion of *Buckley*. 1995 Op. Va. Att'y Gen. 170, 175-76.

forcement when evaluating the law's constitutionality. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court's finding that a municipal ordinance was "readily subject to a narrowing construction that avoids constitutional difficulties," *id.* at 482, was "supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view" of the scope of the ordinance's prohibition, *id.* at 483.

The State Board of Elections is not charged with criminal enforcement of the election laws, *see* Va. Code Ann. §§ 24.2-104 & -1019 (Michie 1997), although it may petition a Virginia court for a writ of mandamus or prohibition to ensure that elections are conducted in accordance with the election law, *see* Va. Code Ann. § 24.2-103 (Michie 1997), or may request that the Attorney General investigate an infraction, *see* Va. Code Ann. § 24.2-104 (Michie 1997). Because the affidavit upon which the appellants rely is simply the opinion of one past secretary of the Board, is not an official proclamation, and in any case simply reiterates that the laws are to be enforced as their plain language suggests they are to be enforced, our opinion is not greatly affected by the affidavit. *See* J.A. at 47-49 (affidavit).

The Attorney General of Virginia does have enforcement authority regarding the election laws, if requested by the State Board of Elections or the Commonwealth's Attorney. *See* Va. Code Ann. §§ 24.2-104 & 2.1-124(A) (Michie 1997). The Supreme Court of Virginia has indicated that although the construction given to a statute by the Attorney General "is of course not binding" on it, it "is entitled to due consideration." *Board of Supervisors of Albemarle County v. Marshall,* 215 Va. 756, 762, 214 S.E.2d 146, 150 (Va. 1975). However, the United States Supreme Court has noted that as Virginia's "Attorney General does not bind the state courts or local law enforcement authorities, we are unable to accept her interpretation of the law as authorita-

tive." *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 395 (1988). In sum, the Attorney General's opinion may be helpful but is not dispositive.

C. Recent Amendments to the Statute Appear to Respond to The Attorney General's Concerns about McIntyre

After the Attorney General issued his opinion, the General Assembly amended the statutes at issue. *See* 1996 Va. Acts ch. 1042. Although most of the 1996 amendments are irrelevant to the issues in this case, certain amendments suggest that the General Assembly was familiar with the Supreme Court's recent holding in *McIntyre*, invalidating a prohibition on anonymous leaflets regarding a referendum. For example, section 24.2-1014, which prohibits anonymous campaign writing, was amended to add the language "made for the purpose of influencing the outcome of an election for public office" to the definition of "writing." 1996 Va. Acts ch. 1042. Furthermore, the type of writings covered in section 24.2-1014(B) was amended to remove the phrase "or concerning any question to be submitted to the voters." *Id.* This was the phrase that the Attorney General in his opinion suggested would not stand up to constitutional challenge because it prohibited anonymous leafleting regarding referenda. Other changes to this section similarly seem to respond to concerns about *McIntyre*.

However, one part of the amendments is not necessarily a response to *McIntyre*, but may have been an effort to conform the statute to the requirements of *Buckley*. Section 24.2-910(B)(3), which previously had required a person (or political committee) to report funds spent in promoting or opposing referendum questions, was deleted. It is possible that this 1996 deletion reflected the General Assembly's new understanding, 20 years after *Buckley v. Valeo,* that reporting requirements might be unconstitutional when applied to speech that did not expressly advocate the election or defeat

of a particular candidate. However, it is more likely that the deletion was just another response to *McIntyre*'s affirmation of the importance of anonymous referendum leafleting — for one cannot be anonymous if one is required to maintain records of and report all supposedly "anonymous" expenditures.

In light of the Attorney General's opinion and the subsequent amendments, perhaps we would find that the statutes are readily susceptible of an interpretation consistent with *McIntyre*, but neither document leads us to believe that we would be justified in narrowing the statute to comport with *Buckley*.

Because no published decision of the Courts of the Commonwealth of Virginia resolves the issues presented here, we certify this question to the Supreme Court of Virginia.

/s/ Francis D. Murnaghan, Jr.
Francis D. Murnaghan, Jr.
Presiding Judge

[OFFICIAL FOURTH CIRCUIT SEAL]

A True Copy, Teste:
Patricia S. Connor, Clerk
BY /s/ Sandra Taylor
Deputy Clerk